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Florida's New Partnership Law: The Revised Uniform Partnership Act and Limited Liability Partnerships

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FLORIDA'S NEW PARTNERSHIP LAW: THE REVISED UNIFORM PARTNERSHIP ACT AND LIMITED LIABILITY PARTNERSHIPS*

JOHN W. LARSON**

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I. INTRODUCTION

The 1995 Florida Legislature dramatically transformed Florida's partnership law by enacting the Florida Revised Uniform Partnership Act (FRUPA or the Revised Florida Act) and by authorizing registered limited liability partnerships (known as RLLPs or LLPs) in Florida.¹

In 1994, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a final revision of the Uniform Partnership Act (RUPA or the Revised Uniform Act).² Although

1. Both acts were enacted as a part of 1995, Fla. Laws ch. 95-242. See *infra* note 4.

2. The original Uniform Partnership Act (UPA) was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1914 and eventually adopted in every state except Louisiana. See Prefatory Note to UNIF. PARTNERSHIP ACT (1994), 6 U.L.A. 1 (1995). Florida adopted the UPA in 1972. See 1972, Fla. Laws ch. 72-108 (codified at FLA. STAT. §§ 620.56-77 (1995)).

An American Bar Association (ABA) report in 1986 called for change. See UPA Rev. Subcomm. of the Comm. on Partnerships and Unincorporated Business Orgs., *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121 (1987). In 1987, NCCUSL appointed a drafting committee to revise the UPA and named Donald J. Weidner, Dean of the Florida State University College of

dramatically different in many ways from the original Uniform Partnership Act (UPA), RUPA is an evolution of traditional partnership law rather than a radical departure from the past. Florida was the fifth state³ to adopt RUPA,⁴ to which it made relatively few changes.

Although enacted as a part of the same bill, the limited liability partnership provisions were not part of RUPA.⁵ Despite their

Law, as the Reporter. Professor Larson was named Assistant Reporter in 1991.

The Revised Uniform Partnership Act was initially approved by NCCUSL in 1992. The following year, in response to suggestions from various groups, including the ABA and several state bar associations, numerous revisions to the Act were adopted. The Revised Act was restyled as the Uniform Partnership Act (1993). Further changes were made the following year, and the Uniform Partnership Act (1994), as finally adopted by NCCUSL, was approved by the ABA House of Delegates in August 1994. See Prefatory Note to UNIF. PARTNERSHIP ACT (1994), 6 U.L.A. 1, 2-5 (1995). Accordingly, all references herein to RUPA are to the final 1994 revision unless otherwise indicated.

3. In 1993, Montana and Wyoming adopted the 1992 version of RUPA. See Montana Uniform Partnership Act, MONT. CODE ANN. §§ 35-10-101 to -616 (1993); Wyoming Uniform Partnership Act, WYO. STAT. §§ 17-21-101 to -1003 (Supp. 1993).

North Dakota and West Virginia adopted the 1994 Revised Act shortly before Florida. See 1995 N.D. Laws ch. 430; 1995 W. Va. Acts ch. 250. Connecticut enacted the Act soon thereafter. See 1995 Conn. Pub. Acts No. 92-341 (Reg. Sess.).

Texas has also adopted a new partnership act heavily influenced by the Revised Uniform Act, although reflecting early drafts of RUPA on several key matters. See Texas Revised Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132b (West 1995).

4. 1995, Fla. Laws ch. 95-242, § 13, 2150, 2160. The Revised Florida Act was introduced by companion bills in the 1995 Florida Legislature as Florida Senate Bill 1690 and Florida House Bill 2187. Most of the changes from the Revised Uniform Act were drafted by a Florida Bar Drafting Committee, a joint effort between the Business and Tax Law Sections. The committee was co-chaired by Philip B. Schwartz, of Miami, and Louis T.M. Conti, of Orlando. Anderson L. (Trey) Baldy III, of Tampa, was the committee reporter. Professor Larson was a member of The Florida Bar Drafting Committee.

Senate Bill 1690 was approved, with one amendment, by the Commerce Committee on April 24, 1995, was referred to the Judiciary Committee and, subsequently, to the Ways and Means Committee, where it died. FLA. S. JOUR. 532 (Reg. Sess. 1995).

House Bill 2187 was referred to the Finance Committee, see FLA. H.R. JOUR. 244 (Reg. Sess. 1995), where a committee substitute bill was introduced and read for the first time on May 1, 1995. *Id.* at 1030, 1034. The bill was then referred to the Appropriations Committee but later died on the calendar. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 242, HB 2187.

On May 2, in the waning days of the session, on recommendation of the Ways and Means Committee, Senator Harris moved that FRUPA be added by amendment to Senate Bill 2296, the Cultural Affairs funding bill. FLA. S. JOUR. 657 (Reg. Sess. 1995). That amendment was further amended by Senator Harris and adopted, as amended. *Id.* at 669. Senate Bill 2296, as amended, was passed unanimously by the Senate on May 2, *id.* at 673, and by the House of Representatives on May 4, 1995. FLA. H.R. JOUR. 1283 (Reg. Sess. 1995). The enrolled bill was sent to the Governor on May 24 and became law without the Governor's signature on June 9, 1995. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 165, SB 2296.

5. The LLP provisions were actually enacted twice by the 1995 Florida Legislature. See 1995, Fla. Laws ch. 95-242, §§ 1-12, 2150, 2152; 1995, Fla. Laws ch. 95-409, §§ 1-12, 3372, 3373.

The LLP legislation was introduced by companion bills as Florida House Bill 717 and Senate Bill 894. House Bill 717 was referred to the Commerce and Finance and Taxation Committees. FLA.

fundamentally different character, limited liability partnerships have swept the nation in the past four years.⁶ An LLP is simply a general partnership except that, by virtue of the statutory LLP provisions, the partners have no personal liability, as partners, for certain debts and obligations of the partnership. The LLP provisions usually amend the state's basic partnership act,⁷ but in a few states, including Florida, they are separate from, but operate in conjunction with, the state's partnership act.⁸

After eighty years of nearly uniform and virtually unchanged partnership law, the recent passage of these two laws has ushered in a

H.R. JOUR. 56 (Reg. Sess. 1995). The Commerce Committee referred the bill to the Banking and Corporations Subcommittee, which recommended the bill favorably, with one amendment. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 256, HB 717. On March 16, the Commerce Committee approved a Committee Substitute for HB 717. FLA. H.R. JOUR. 304 (Reg. Sess. 1995). That bill was then referred to the Finance and Taxation Committee, which recommended the bill favorably on April 18. *Id.* at 565. On April 27, CS for HB 717 was placed on the Consent Calendar and, with amendments, was passed by the House of Representatives by a vote of 115 to 1. *Id.* at 879. On May 2, the Senate substituted CS for HB 717 for CS for SB 894 and passed the bill, 38 to 0. FLA. S. JOUR. 673 (Reg. Sess. 1995). The enrolled bill was sent to the Governor on June 6 and became law without his signature on June 18, 1995. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF HOUSE BILLS at 256, HB 717; see 1995, Fla. Laws ch. 95-409. The effective date of that bill was October 1, 1995. 1995, Fla. Laws ch. 95-409, 3372, 3382.

On May 2, the same day the Senate passed CS for HB 717, Senator McKay moved to amend SB 2296 further by adding the LLP provisions. FLA. S. JOUR. 670 (Reg. Sess. 1995). As amended, SB 2296 passed the Senate on May 2 by a vote of 38 to 0. *Id.* at 673. Thereafter, on May 4, after the enactment of CS for HB 717 on May 2, the House of Representatives passed SB 2296, as amended to include both FRUPA and the LLP provisions, by a vote of 111 to 0. FLA. H.R. JOUR. 1283 (Reg. Sess. 1995). The enrolled bill was sent to the Governor on May 5 and became law without his signature on June 9, 1995. FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 165, SB 2296; see 1995, Fla. Laws ch. 95-242. The effective date of the LLP provisions was July 1, 1995. 1995, Fla. Laws ch. 95-242, 2150, 2152.

The LLP provisions in the two bills were identical, except for their respective effective dates. Chapter 95-242 supersedes Chapter 95-409, having been enacted subsequently by the Legislature. Thus, the LLP provisions became effective July 1, 1995. See FLA. STAT. § 1.04 (1995); *id.* at viii (Revisor's explanation in Preface).

6. See Robert R. Keatinge, George W. Coleman, Allan G. Donn & Elizabeth G. Hester, *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization*, 51 BUS. LAW 147, 148 (1995); ABA COMMITTEE ON PARTNERSHIPS AND UNINCORPORATED ORGANIZATIONS, 5 STATE LIMITED LIABILITY COMPANY & PARTNERSHIP LAWS § 1 (Michael A. Bamberger & Arthur J. Jacobson eds., 1995) [hereinafter ABA GUIDE TO LLPs]. The latter contains an excellent commentary on LLPs generally, written by Elizabeth G. Hester, as well as the text of the various state LLP statutes. See generally ALAN R. BROMBERG & LARRY E. RIBSTEIN, *LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT* (1995) [hereinafter BROMBERG & RIBSTEIN ON LLPs].

7. The exculpatory provision itself usually amends the state's version of UPA § 15, which provides that partners are personally liable for the partnership's debts and obligations. See, e.g., 6 DEL. LAWS § 1515 (1995); IOWA CODE § 486.15 (1995); N.C. GEN. STAT. § 59-45 (1995).

8. See, e.g., LA. REV. STAT. § 9:3431 (1995); MICH. COMP. LAWS § 449.46 (1995); 15 PA. CONS. STAT. § 8204 (1994). For a general discussion of the structure of LLP provisions, see ABA GUIDE TO LLPs, *supra* note 6, § 2.

truly new era of partnership jurisprudence, both in the United States and in Florida. This Article will explain the major changes in partnership law wrought by the Revised Florida Act, identify the Florida nonuniform provisions,⁹ and consider the meaning and significance of Florida's limited liability partnership legislation.

II. THE FLORIDA REVISED UNIFORM PARTNERSHIP ACT

A. *Definition and Formation of a Partnership*

Under the Revised Florida Act, as in the UPA, a partnership is defined as an association of two or more persons to carry on as co-owners a business for profit, except an association formed under any other statute (such as a corporation or a limited liability company).¹⁰ As under the UPA, no filing is required to form a partnership.¹¹ Thus, partnership remains the residual form of business association under

9. Since the Revised Florida Act is, for the most part, identical to the Revised Uniform Act, the discussion and citation herein will be to FRUPA. Material nonuniform Florida amendments will be discussed with appropriate citation to the Revised Uniform Act.

The Revised Florida Act is codified as part IV of chapter 620, sections 620.81001-.91, *Florida Statutes*. The last three digits of the FRUPA section numbers correspond to the RUPA section numbers, except that FRUPA subsections are numbered and paragraphs are lettered. For example, section 620.8401(1)(b), *Florida Statutes*, corresponds to RUPA § 401(a)(2), and will be cited herein as FRUPA § 401(1)(b).

10. The Uniform Partnership Act § 6 provides:

- (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.
- (2) But any association formed under any other statute of this state . . . is not a partnership under this [A]ct . . . ; but this [A]ct shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

The Revised Florida Act § 202 in part provides:

- (1) Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.
- (2) An association formed under a statute, other than this [A]ct, a predecessor statute [i.e., the UPA], or a comparable statute of another jurisdiction is not a partnership under this [A]ct.

The Uniform Partnership Act § 6(1) serves a dual function. It is both the definition of "partnership," as well as the operative provision for the formation of a partnership. Critics frown on statutory "definitions" serving such dual functions. Accordingly, FRUPA § 202 is the operative provision, while FRUPA § 101(5) is definitional: " 'Partnership' means an association of two or more persons to carry on as co-owners a business for profit formed under [§ 202], predecessor law, or comparable law of another jurisdiction."

11. Florida provides for the registration of partnerships with the Department of State. See FRUPA § 105(1). Registration is voluntary, in the sense that it is not required by law, but is a condition precedent to the filing of other "statements," such as a statement of authority. See *id.* § 105(4). Therefore, registration is required of partnerships seeking the benefits of filed statements. See discussion *infra* notes 76-97, 202-09, 219-21, 257-62 and accompanying text. Registration is a nonuniform Florida provision.

FRUPA, which may result in a so-called "inadvertent partnership." In stating that a partnership is formed, "whether or not the persons intend to form a partnership," no substantive change is intended since the FRUPA formulation codifies UPA case law which holds that the requisite intent to the formation of a partnership is not the subjective intention to be partners, but rather whether the parties intended "to carry on as co-owners a business for profit."¹²

One important change is intended, however. Limited partnerships are *not* "partnerships" within the meaning of the Revised Florida Act inasmuch as they are formed under the Revised Uniform Limited Partnership Act (RULPA).¹³ Nevertheless, FRUPA will continue to govern limited partnerships because RULPA itself so requires "in any case not provided for" in RULPA.¹⁴

The Revised Florida Act provides three rules for determining whether a partnership has been formed.¹⁵ As under the UPA, a partnership is presumed to exist if profits from a business are shared, unless the profit share has been received in payment of a debt, or as wages, rent, or under any other enumerated relationship.¹⁶ Profit sharing by joint owners of property does *not* by itself establish a partnership,¹⁷ nor does the sharing of gross returns.¹⁸

B. Partnership as an Entity

Although the law merchant had long accorded entity treatment to partnerships, the common law did *not* recognize partnerships as legal

12. See RUPA § 202, cmt. 1.

13. See *id.* § 202, cmt. 2. UPA § 6(2) expressly provides that the UPA applies to limited partnerships unless otherwise provided by the Revised Uniform Limited Partnership Act (1976) With The 1985 Amendments, 6A U.L.A. 1 (1995) (RULPA). RUPA § 202(b) provides no such exception. *Accord* FRUPA § 202(2).

14. See RULPA § 1105. In light of that section, UPA § 6(2), providing that limited partnerships are governed by the UPA, has not been carried over to FRUPA. The Revised Florida Act thus more properly allows RULPA to link FRUPA and RULPA. For clarity, the Florida RULPA has been amended to read: "In any case not provided for in this act [RULPA], the provisions of the Uniform Partnership Act or the Revised Uniform Partnership Act, as applicable, and the rules of law and equity shall govern." FLA. STAT. § 620.186 (1995) (as amended by 1995, Fla. Laws ch. 95-242, § 22, 2150, 2189) (new text underlined). The new text is intended to afford existing Florida limited partnerships the same deferred applicability date established by 1995, Fla. Laws ch. 95-242, § 14, for existing general partnerships, absent an election to be governed earlier by FRUPA. See *infra* note 266 and accompanying text.

15. FRUPA § 202(3).

16. *Id.* § 202(3)(c). The sharing of profits is cast as a rebuttable presumption, rather than as prima facie evidence. Compare UPA § 7(4). No substantive change is intended. See RUPA § 202, cmt. 3. One of the enumerated relationships covers a lender's receipt of profits under a shared appreciation mortgage. See FRUPA § 202(3)(e).

17. *Id.* § 202(3)(a).

18. *Id.* § 202(3)(b).

entities, but conceptualized them as the aggregate of the partners.¹⁹ The UPA was somewhat ambivalent about the nature of a partnership,²⁰ but the aggregate notion continued to dominate legal analysis.²¹ The Revised Florida Act explicitly states that "a partnership is an entity distinct from its partners,"²² greatly simplifying, among other things, the continued existence of the partnership despite the departure of a partner.²³ One important attribute of the aggregate theory is retained: partners remain jointly and severally liable for all of the partnership's debts and obligations.²⁴ More importantly, partnerships will continue to be accorded pass-through treatment for federal income tax purposes, despite their entity characterization under state law.²⁵

C. Default and Mandatory Rules

The Revised Florida Act continues in the partnership tradition that most of the legal rules are *not* mandatory and can be varied by agreement of the partners.²⁶ Thus, with few exceptions, FRUPA affords great flexibility by allowing the partners to custom tailor the relationship in the partnership agreement.²⁷ The statute is the default contract to the extent the partnership agreement does not provide otherwise.²⁸

19. See JUDSON A. CRANE & ALAN R. BROMBERG, *LAW OF PARTNERSHIP* § 3, at 18-25 (1968).

20. See Commissioners' Prefatory Note to the UNIF. PARTNERSHIP ACT (1914), 6 U.L.A. 7 (1969); see also CRANE & BROMBERG, *supra* note 19, § 3, at 26-29.

21. See MELVIN A. EISENBERG, *AN INTRODUCTION TO AGENCY AND PARTNERSHIP* 38-39 (2d ed. 1995); CRANE & BROMBERG, *supra* note 19, § 3, at 26-29.

22. FRUPA § 201.

23. See *infra* part II.G.

24. FRUPA § 306(1).

25. See *Simplification of Entity Classification Rules*, I.R.S. Notice 95-14, 1995-14 I.R.B. 7 (Mar. 29, 1995), in which the IRS proposes to discard the complex entity classification system currently used to determine whether an unincorporated business entity, such as a limited partnership or a limited liability company, is to be classified as a "partnership," entitled to pass-through taxation, or as an "association," which must pay tax at the entity level as a corporation. Many unincorporated entities would like to be classified as a partnership to avoid two-tiered taxation. The proposal has been well received. See, e.g., Thomas E. Rutledge, *IRS Considers End to Kintner Analysis of Unincorporated Associations*, LLC ADVISOR (CCH), Apr. 1995, at 4; Daniel Shefter, *Check the Box Partnership Classification: A Legitimate Exercise in Tax Simplification*, 95 TAX NOTES TODAY, Apr. 13, 1995, at 72-44; see generally Daniel S. Goldberg, *The Tax Treatment of Limited Liability Companies: Law in Search of Policy*, 50 BUS. LAW. 995 (1995).

26. Most of the UPA rules may be varied by agreement of the partners. See, e.g., UPA § 18 ("The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules . . .").

27. FRUPA § 103(1).

28. *Id.*

There are only nine exceptions.²⁹ Florida adds a tenth exception.³⁰ One exception³¹ continues the UPA rule that a partner may withdraw voluntarily from the partnership at any time, even in contravention of the partnership agreement.³² Other exceptions proscribe the complete elimination of a partner's fiduciary duties of care and loyalty and obligation of good faith and fair dealing, but permit the partners to vary contractually the standard of conduct required, if not unreasonable.³³ The final "exception," which provides that the rights of third parties under the Act may not be restricted in the partnership agreement,³⁴ is something of a misnomer; it simply restates the inherent limitation that only parties to a contract are bound by the contract.

Constrained only by these few exceptions, partners are free to arrange their internal affairs.³⁵ The Revised Florida Act provides an array of standard terms that may be "selected" by the parties without incurring further negotiating and drafting costs and that will be imposed on them if they fail to provide otherwise in their partnership agreement. There are advantages to using the standard language. To the extent that the Act's default rules satisfy the needs of the parties, the statutory regime is efficient. Furthermore, the meaning of standard terms will be less uncertain than unique contract terms drafted by the parties.³⁶

29. RUPA § 103(b). All nine exceptions are clearly identified and conveniently enumerated in that section.

30. See FRUPA § 103(2)(g) (providing that the partnership agreement may not change the notice provisions contained in FRUPA §§ 902(6) and 905(6), themselves additional nonuniform requirements for the Article 9 "safe harbor" for partnership conversions and mergers); *infra* notes 222-24 and accompanying text. Articulating those notice requirements as immutable rules misperceives the concept of a "safe harbor." As FRUPA § 908 makes clear, the Article 9 "rules" are not exclusive, and partnerships may be converted or merged in any other manner provided by law. The benefit of complying with the "safe harbor" requirements is merely the comfort of knowing that the transaction is valid and has the legal consequences set forth in the Act.

FRUPA § 103(2) was mysteriously edited in the legislative process, so that the uniform exceptions found in RUPA § 103(b)(1)-(3) are lumped irrationally together in FRUPA § 103(2)(a)1-3 and the remaining exceptions are redesignated (b) through (h). It appears that no substantive change is intended, and the section's uniform structure would be restored by House Bill 1043, a so-called "glitch bill" that has already been introduced in the 1996 Legislative Session by Representative Livingston.

31. FRUPA § 103(2)(d).

32. See UPA § 31(2); FRUPA § 602(1). As under UPA § 38(2)(a), a partner who has wrongfully withdrawn in contravention of the agreement is liable for any damages caused by breach of the agreement. See FRUPA § 602(3).

33. FRUPA §§ 103(2)(a)3, (b), (c), discussed *infra* notes 122-24, 132, 135 and accompanying text.

34. FRUPA § 103(2)(h).

35. The Revised Uniform Act thus provides off-the-rack standard contract terms that may be utilized by the parties without the cost of further negotiation and drafting.

36. One of the primary benefits of a "uniform" law is that a richer body of case law will be

The Act's default rules were drafted for a small, informal partnership, in which all of the partners are active and contribute both money and human capital. The Revised Uniform Act attempts to provide a body of default rules that are similar to those that would be crafted by partnership lawyers seeking to provide a commercially reasonable and efficient organizational structure. To the extent that a partnership differs from the paradigm or the parties' preferences diverge from the norm, different rules may be more appropriate.

D. Filing and Effect of Partnership Statements

One of the Revised Florida Act's major innovations is a regime of voluntary filed statements³⁷ containing certain basic information about a partnership, such as who has the authority to transfer or mortgage partnership real property.³⁸ The drafters of the Revised Uniform Act believed it likely that filing would become routine for many partnerships and would be required by sophisticated lenders because reliance on filed statements affords greater certainty in partnership transactions, at minimal cost and inconvenience.³⁹ That may not be the case in Florida because of a cumbersome nonuniform requirement⁴⁰ and the availability of a familiar alternative for many transactions.⁴¹

The drafters of RUPA contemplated that the filing of partnership statements would be similar to Uniform Commercial Code (UCC) filings. Filing would be statewide, probably in the office of the Secretary of State, whose only duty would be to index filed statements in the name of the partnership as indicated on the statement. Filing fees would be modest, and responsibility for the accuracy of the statement and determination of its legal effect would be left entirely to the parties.

developed construing its meaning, especially those terms that suffer from some ambiguity. Uniform language is also the subject of scholarly debate, leading to a better understanding of its nuance of meaning.

37. The Revised Florida Act authorizes a partnership to file the following statements: 1) a statement of partnership authority under FRUPA § 303; 2) a statement of denial under FRUPA § 304; 3) a statement of dissociation under FRUPA § 704; 4) a statement of dissolution under FRUPA § 805; and 5) a statement of merger under FRUPA § 907. The term "statement" is defined to mean those statements, or an amendment or cancellation thereof. FRUPA § 101(13). The filing of such statements is entirely voluntary. *See, e.g., id.* §§ 105(1), 303(1) (statement of partnership authority).

38. *See generally* Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 34 (1993) [hereinafter *Reporters' Overview*].

39. *See* RUPA § 105, cmt. 1.

40. *See infra* note 43 and accompanying text.

41. *See* FLA. STAT. § 689.045 (1995), discussed *infra* notes 98-100 and accompanying text.

The Revised Florida Act, while not mandating that all partnerships register with the Department of State,⁴² nevertheless requires registration as a condition precedent to the filing of most partnership statements, including a statement of partnership authority.⁴³ Registration effectively increases the cost of partnership filings and may at times be intrusive. The filing fee for a registration statement is \$50, while the fee for other statements is \$25.⁴⁴ A certified copy of a filed statement, which is required for recording transfers of real property,⁴⁵ costs \$52.50.⁴⁶ While those fees are modest with respect to a large transaction, they may discourage the routine use of statements by smaller partnerships.⁴⁷

E. Partnership Property

1. Nature of Partnership Property

The Revised Florida Act's entity approach has greatly simplified the rules regarding the nature and transfer of partnership property. Discarding the UPA's confusing concept of tenancy in partnership, FRUPA provides simply, "Property acquired by a partnership is property of the partnership and not of the partners individually."⁴⁸

As tenants in partnership, each partner is a co-owner with the other partners of an undivided interest in specific partnership property,⁴⁹ but without most of the usual incidents of ownership, such as the right to possess the property for non-partnership purposes⁵⁰ or the

42. The Revised Florida Act § 105(1) provides that a partnership "may" file a registration statement with the Department of State. A "registration statement" is *not* a "statement" within the meaning of that term. Compare FRUPA § 101(11) ("registration" or "registration statement") with § 101(13) ("statement").

43. FRUPA § 105(4). A "statement" may be filed with the Department of State *only if* the partnership has filed a registration statement, except those statements provided for by FRUPA § 304 (statement of denial) or § 704 (statement of dissociation). *Id.* § 105(4). Thus, a statement of dissolution may not be filed under § 304 unless the partnership had been previously registered.

The Department of State is authorized to adopt administrative rules as necessary to carry out its duties and functions under the Act. FRUPA § 105(2). Official forms of partnership statements have been adopted. See SANDRA B. MORTHAM, SECRETARY OF STATE, PARTNERSHIPS IN FLORIDA (1995).

44. FRUPA § 1055(1). The fee for filing a UCC financing statement (Form UCC-1) is also \$25. FLA. STAT. § 15.091(1)(a) (1995).

45. See FRUPA § 105(8).

46. *Id.* § 1055(1)(i).

47. FLA. STAT. § 689.045 (1995), discussed *infra* notes 98-100 and accompanying text.

48. FRUPA § 203.

49. See UPA § 25(1). Tenancy in partnership reflects the aggregate theory of partnership. See *Reporters' Overview*, *supra* note 38, at 28.

50. UPA § 25(2)(a).

right to alienate the partner's interest in specific partnership property.⁵¹ The change in theory is underscored further by the express negation of a partner's co-ownership of specific partnership assets: "Partnership property is owned by the partnership as an entity, not by the partners as co-owners. A partner has no interest that can be transferred, either voluntarily or involuntarily, in specific partnership property."⁵² Only a partner's economic interest in the partnership as a whole is transferable.⁵³ As under the UPA, that interest is conclusively deemed to be personal property, without regard to the nature of specific partnership property.⁵⁴

2. *Transfer of Partnership Property*

Another advantage of the entity theory is the certainty of ownership afforded partnership property and the rules regarding its transfer. The Revised Florida Act draws a distinction between property acquired "in the name of the partnership" and other partnership property. Property acquired in the name of the partnership is conclusively deemed to be partnership property,⁵⁵ and the rules regarding the transfer of property held of record by the partnership are explicit,⁵⁶

51. *Id.* §§ 25(2)(b), (c). By defining the "incidents of this tenancy" in a manner that denies individual partners the usual incidents of ownership, the UPA reaches an entity result masquerading in aggregate terms. For example, a partner may not grant a security interest in specific partnership property to a personal creditor. *In re O'Connell*, 119 B.R. 311, 314 (Bankr. M.D. Fla. 1990).

52. FRUPA § 501. The Revised Uniform Act § 501 provides: "A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily." The Florida modification merely emphasizes the change from the UPA; no substantive change from RUPA is intended.

53. "The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions." FRUPA § 502. A "distribution" is "a transfer of money or other property from a partnership to a partner in the partner's capacity as a partner" *Id.* § 101(4). A partner's "transferable interest" is to be distinguished from the partner's "partnership interest." The latter means "all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights," such as a partner's information rights. *Id.* § 101(8) (emphasis added). Those rights, including the right to participate in management, are not transferable, but are conferred only if the transferee is admitted as a partner.

54. FRUPA § 502, second sentence, which reads: "A partner's interest in the partnership is personal property" (emphasis added). That is a slight change from RUPA § 502, which reads, "The only transferable interest of a partner in the partnership is the partner's share of the profits and losses of the partnership and the partner's right to receive distributions. The interest is personal property." A partner's interest in the partnership is *not* the same as her transferable interest. See *supra* note 53. The Florida comment indicates the change was intended to clarify that a partner's entire interest in the partnership is personal property, not merely her transferable interest. The clarification seems unnecessary, especially in light of UPA precedent, and is out of place in a section entitled "Partner's transferable interest in partnership."

55. FRUPA § 204(1)(a).

56. *Id.* § 302(1).

enhancing reliance on record title for the benefit of both partners and third parties. Moreover, FRUPA expressly extends the protection of record title to personal property acquired in the name of the partnership.⁵⁷ Property is acquired "in the name of the partnership" by a transfer to: 1) the partnership in its name or 2) one or more partners in their capacity as partners, if the name of the partnership is indicated in the instrument of transfer.⁵⁸ In either case, the partnership's interest can be ascertained from the applicable title records or instruments transferring title.

Property not acquired in the name of the partnership may also be partnership property. Property acquired in the name of one or more of the partners with *an indication in the instrument of conveyance* of either 1) the transferee's "capacity as a partner" or 2) "the existence of a partnership but without an indication of the name of the partnership" is deemed conclusively to be partnership property.⁵⁹ Such conveyances evidence the partners' intention that property so acquired is partnership property, and third parties are alerted by the record to a possible partnership interest in the property.

Furthermore, as under prior law,⁶⁰ property that is acquired in the name of one or more of the partners *without any record indication* of the partnership's interest may nevertheless be partnership property, subject to two rebuttable presumptions: 1) property purchased with partnership assets is presumed to be partnership property;⁶¹ and 2) property purchased without use of partnership assets is presumed to be the partner's separate property, even if used for partnership purposes.⁶² Ultimately, it is a question of fact whether the partners intended that property acquired in the name of a partner, without any indication of the partnership's interest, would belong to the partnership or to the named partner individually.⁶³

57. *Id.* Under UPA § 8(3), real property may be acquired in the partnership name, but the Act is silent regarding personal property. See RUPA § 302, cmt. 2.

58. FRUPA § 204(2). Therefore, the deed or certificate of title by which the partnership acquires the property must indicate the correct name of the partnership. Otherwise, reliance on the record title is unwarranted.

59. FRUPA § 204(1)(b).

60. UPA § 8 *see, e.g.*, *Standring v. Standring*, 794 P.2d 1089, 1090 (Colo. App. 1990).

61. FRUPA § 204(3) (continuing the presumption in UPA § 8(2) that "property acquired with partnership *funds*" is partnership property) (emphasis added). The RUPA presumption is expanded to cover property purchased with partnership "*assets*," which is intended to apply if the firm's credit is used to obtain financing. RUPA § 204, cmt. 3 (emphasis added).

62. FRUPA § 204(4). In effect, the Act presumes that the partner is contributing the use of the property to the partnership, not the property itself. See RUPA § 204, cmt. 3.

63. The intention of the parties is controlling, at least as among the partners. See *id.*

3. Partner's Agency Authority

The Revised Florida Act does not alter a partner's general agency authority to bind the partnership, with one very important qualification.⁶⁴ The Act provides that, *subject to the effect of a statement of partnership authority*, a partner has both actual and apparent authority to bind the partnership by acts, including the execution of an instrument in the partnership name, in the ordinary course of business.⁶⁵ Statements of authority aside, partners may limit a partner's actual authority⁶⁶ even in ordinary course matters or they may expand a partner's actual authority by authorizing acts beyond the ordinary course of business.⁶⁷ If a partner's actual authority to act in the ordinary

64. UPA § 9(1).

65. FRUPA § 301(1). Under the UPA, a partner's apparent authority is limited to "carrying on in the usual way the business of the partnership." UPA § 9(1). The Revised Florida Act clarifies that a partner's apparent authority extends to acts done in the ordinary course of business "of the kind carried on by the partnership." FRUPA § 301(1). Florida adds the nonuniform qualification: "in the geographic area in which the partnership operates." *Id.* That seems implicit in the uniform act, and no substantive change is intended. See FRUPA § 301, Fla. cmt. THE FLORIDA BAR, CONTINUING LEGAL EDUC. COMM., FLORIDA PARTNERSHIP LAW 31 (1995) [hereinafter FLORIDA BAR CLE ON PARTNERSHIP LAW]. The Florida comment to FRUPA are not official, but were prepared by The Florida Bar Drafting Committee (see *supra* note 4) to explain its proposed nonuniform amendments to RUPA. The comments accompanied the draft bill submitted to the Florida legislature and thus constitute part of FRUPA's legislative history, albeit unofficial. The Florida comments accompany the statutory text of the Revised Florida Act found in The Florida Bar's materials.

66. FRUPA § 301(1) states, "Each partner is an agent of the partnership for the purpose of its business" To the extent that is the default scope of each partner's *actual* authority, it may be varied in the partnership agreement as provided in FRUPA § 103(1). To the extent that it also defines the scope of each partner's *apparent* authority, a third party is not bound by an unknown restriction on a partner's authority unless the limitation is contained in a recorded statement of authority, as provided in FRUPA § 303.

67. The Revised Uniform Act § 301(2) provides that the partnership is bound by a partner's act beyond the ordinary course of business "only if the act was authorized by the other partners." Under RUPA § 401(j), an act outside the ordinary course of business may be undertaken only with the consent of all of the partners, unless the partnership agreement provides for less than unanimous consent. Thus, "authorization by the other partners" under RUPA § 301(2) requires unanimous consent unless the partnership agreement provides otherwise.

That result may be changed by FRUPA, which provides that the partnership is bound only if a partner's extraordinary act was "authorized by *all of the other partners or is authorized by the terms of a written partnership agreement.*" FRUPA § 301(2) (emphasis added). According to the Florida comment, the change was intended to make the RUPA rule "particularly clear." FRUPA § 301, Fla. cmt. FLORIDA BAR CLE ON PARTNERSHIP LAW, *supra* note 65, at 31. Unfortunately, the requirement of a written partnership agreement conflicts with the general rule respecting partnership agreements, "whether written, oral, or implied." FRUPA § 101(6). Moreover, it is unclear under the Florida formulation whether the act itself must be "authorized by the terms of a written partnership agreement" or whether the act may, as contemplated by RUPA, be authorized by less than unanimous consent if so provided in the partnership agreement. If the concern is that the partnership should not be bound by a partner's extraordinary act

course of the partnership's business is limited, the partnership may still be bound by the partner's apparent authority unless the other party "knew or had received a notification"⁶⁸ of the partner's lack of authority.⁶⁹

Promoting reliance on the record chain of title to property held in the name of the partnership (including titled personal property, as well as real property), FRUPA clarifies the UPA's rules⁷⁰ governing the transfer of partnership real property by providing that, absent a filed statement of authority, every partner has the authority to transfer property held in the name of the partnership.⁷¹ To avoid a partner's unauthorized transfer and recover the property, the partnership

unless clearly authorized by the other partners, it is somewhat ameliorated by the burden of proof. Under general agency principles, preserved by FRUPA § 104(1), the burden of proof is on a third party who claims that an agent has authority to act beyond the ordinary course of the principal's business. *See, e.g.,* *General Overseas Films, Ltd. v. Robin Int'l, Inc.*, 542 F. Supp. 684, 688-89 (S.D.N.Y. 1982); *Croissant v. Watrud*, 432 P.2d 799, 803 (Or. 1967).

Finally, it should be noted that the partnership may be bound under FRUPA § 303(3)(a) by a partner's act that is within a grant of extraordinary authority contained in a filed statement of partnership authority, whether or not authorized by all of the other partners, since the § 301 rules are subject to the effect of a statement of authority under § 303.

68. *See* FRUPA § 102(2) (meaning of "knows"); *id.* § 102(4) (meaning of "receives a notification").

69. *Id.* § 301(1). Under FRUPA § 102(1), a person "knows" a fact if she has actual knowledge of it. Thus, knowledge means cognitive awareness and is a question of fact. *See* RUPA § 102, cmt. A person "receives a notification" when it comes to her attention or is duly delivered at the person's place of business or at any other place held out as a place for receiving communications, whether or not the person actually learns of the communication. FRUPA § 102(4).

Under FRUPA, a person has "notice" of a fact if she knows or has received a notification of the fact or if she has reason to know it exists from all of the facts known to her at the time in question. *Id.* § 102(2). Thus, "notice" includes the traditional concept of inquiry notice and requires reasonable diligence when triggered by known facts. The FRUPA definitions are based on those found in UCC §§ 1-201(25)-(27) (1989) (UCC). *See* RUPA § 102, cmt.

Under FRUPA § 301(1), the partnership is bound by a partner's apparent authority unless the other party knows or has received a notification of the partner's lack of authority; notice is not enough. That marginally shifts the allocation of risk of a partner's lack of authority to the partnership, which ought to bear the risk of a rogue partner acting in the ordinary course of business, but without actual authority. Compare UPA § 9(1), which provides that the partnership is bound unless the other party has "knowledge" of the lack of authority; UPA § 3(1), however, defines "knowledge" to include "knowledge of such other facts as in the circumstances shows bad faith." Under FRUPA, the partnership cannot avoid liability by asserting the other party failed to inquire about the partner's authority. To protect itself, the partnership may send a notification of a partner's lack of authority to persons dealing with that partner.

70. UPA § 10.

71. FRUPA § 302(1)(a). As FRUPA § 302(2) makes clear, however, that authority is subject to the FRUPA § 301 general rules governing a partner's authority. Thus, each partner has apparent and, unless restricted, actual authority to execute conveyances for the transfer in the ordinary course of business of property held in the name of the partnership, but a partner's authority to transfer such property beyond the ordinary course of business must be actual. *See* FRUPA § 301.

must prove that the partner lacked both actual and apparent authority.⁷²

Partnership property held in the name of one or more partners may be transferred by an instrument of transfer executed by partners in whose name the property is held, whether or not there is a record indication of their capacity as partners or of the existence of a partnership.⁷³ To recover such property transferred without authority, the partnership must prove that the partner executing the conveyance lacked authority, actual or apparent, and, if there was no record indication of a possible partnership interest in the property, that the transferee knew (or had received a notification) that the property was partnership property.⁷⁴

4. *Effect of a Statement of Partnership Authority*

The UPA provides no convenient means of establishing on the record that partners have the authority to execute instruments of conveyance on behalf of the partnership. Therefore, costly and cumbersome practices to evidence partnership authority were developed, especially with respect to the transfer of real property.⁷⁵ The most important goal of the Revised Florida Act's new system of filed statements, and particularly the statement of partnership authority, is to provide a more convenient, efficient, and reliable means of establishing partners' record authority with respect to the transfer of real property held in the name of the partnership.⁷⁶

Under FRUPA, a partnership may file a statement of partnership authority naming those partners authorized to execute an instrument

72. *Id.* § 302(2). The burden of proof is on the partnership. See RUPA § 302, cmt. 3. If the initial transferee of the partnership property has, in turn, transferred the property to a purchaser for value, the partnership must also prove that the subsequent transferee knew or had received a notification that the partner executing the instrument of initial transfer lacked authority. FRUPA § 302(2)(a). The partnership may not recover the property from a subsequent transferee if any prior transferee in the chain of title would have prevailed over the partnership. *Id.* § 302(3).

73. *Id.* §§ 302(1)(b) (indication), (c) (no indication).

74. *Id.* § 302(2)(b). That additional requirement protects only transferees for value.

75. For example, grantees from the partnership and lenders often require that deeds and mortgages be executed by all of the partners or that affidavits of authority be executed and recorded. See Edward S. Merrill, *Partnership Property and Partnership Authority Under the Revised Uniform Partnership Act*, 49 BUS. LAW. 83, 95 (1994).

Florida has long had a nonuniform provision that somewhat simplifies establishing of record a partner's authority to execute instruments of conveyance of partnership real property. See FLA. STAT. § 620.605(1) (1995), discussed *infra* notes 98-99 and accompanying text.

76. See RUPA § 303, cmt. 2. In Florida, a partnership's eligibility to file and record a statement of authority is conditioned on its prior registration with the Department of State. FRUPA § 105(4), discussed *supra* note 43 and accompanying text.

transferring *real property* held in the name of the partnership⁷⁷ and specifying the authority, or limitations on the authority, of some or all of the partners to enter into other transactions on behalf of the partnership.⁷⁸ Under the Revised Florida Act, a partnership may not file a statement of authority unless the partnership has previously filed a registration statement with the Department of State.⁷⁹ The registration statement must include the names and mailing addresses of all of the partners or the name and address of an agent appointed by the partnership who will maintain a partners' list and, on request, make it available to any person showing good cause.⁸⁰

To be effective, any statement filed on behalf of the partnership must be executed by at least two partners.⁸¹ A copy of all statements filed must be sent promptly to every non-filing partner and to any other person named as a partner in the statement.⁸² To be effective with respect to real property, a *certified copy* of the statement⁸³ must

77. FRUPA § 303(1)(a) (emphasis added).

78. *Id.* § 303(1)(b). The statement may include any other matter the partnership chooses.

79. This nonuniform amendment is found in FRUPA § 105(4).

80. *Id.* § 105(1)(c); *cf.* RUPA § 303(a). The registration statement must also include the partnership's name; the street address of its "chief executive office," and principal Florida office, if there is one; the partnership's Federal Employer Identification Number; and the recorded document number of each partner that is a business entity rather than a natural person. FRUPA §§ 105(1)(a), (b), (d), (e).

Under RUPA, there is no provision for the "registration" of partnerships. However, a statement of authority *must* include the name of the partnership, the street address of its chief executive office and of an office in the state, if any, as well as the names and mailing addresses of all of the partners or of an agent appointed by the partnership to maintain a list of the partners' names and addresses, available to any person on request for good cause shown. RUPA §§ 303(a)(1)(ii), (iii), (b).

Traditionally, public disclosure of partners' names has not been required by law, and so-called silent partners are common. Thus, disclosure of the identity of all the partners is, in effect, a "tax" on the right to use partnership statements; the underlying policy of the requirement is not readily apparent, however. Under FRUPA § 303(2), failure to disclose the names of the partners does not impair a filed statement's operative effect, provided the statement is properly executed and states the name of the partnership. The reference in that section to FRUPA § 105(3) is in error; it should refer to FRUPA § 105(6). Compare RUPA § 303(c). The error will be corrected in the "glitch bill."

81. FRUPA § 105(6). That is a compromise between the security of requiring all or a majority of the partners to sign and the convenience of a single partner. Presumably, a registration statement must also be signed by at least two partners, although § 105(6) applies only to "statements," and a registration statement is not within the FRUPA § 101(13) definition of a "statement." See *supra* note 42.

82. FRUPA § 105(9). Failure to send a copy of a statement to a partner or other person does not limit its operative effect. *Id.*

83. *Id.* § 105(8). A recorded statement that is not a certified copy of a statement filed with the Department of State does not have the effect provided for recorded statements in the Act. *Id.* This provision avoids inconsistencies between statements affecting the title to real property. See RUPA § 105, cmt. 3.

be recorded in the office for recording transfers of real property.⁸⁴ Statements may be amended or canceled,⁸⁵ and the accuracy of any statement may be denied.⁸⁶

a. Transfers of Real Property

The legal effect of a statement of authority differs markedly depending on the nature of the transaction. Most significantly, the Revised Florida Act affords almost absolute protection to both the partnership and transferees with respect to the authority of a partner to transfer real property held in the name of the partnership.⁸⁷

First, a grant of authority to one or more of the partners to transfer real property held in the name of the partnership is conclusive in favor of a purchaser for value unless either 1) a limitation on that authority is then of record or 2) the purchaser has *knowledge* of the partner's actual lack of authority.⁸⁸ Since every partner has at least apparent

84. In Florida, the clerk of the circuit court is the recorder of all instruments authorized by law to be recorded, including instruments relating to the transfer of real property located in the county. FLA. STAT. § 28.222(1) (1995). All instruments are recorded in one general series of books called the "Official Records." *Id.* § 28.222(2). Unless recorded, a transfer of real property is not effective against creditors or subsequent purchasers for value and without notice. *See id.* § 695.01(1).

85. FRUPA § 105(7). Unless canceled earlier, a statement of authority is canceled by operation of law after five years. *Id.* § 303(6).

86. *Id.* § 304. A statement of denial is a limitation on authority as provided in FRUPA § 303(3) and (4), the operative effect of which is discussed *infra* in notes 90-91 and accompanying text. *See* FRUPA § 304(3). The references in that section to FRUPA § 303(5) and (6) are in error. The references should be to FRUPA § 303(3) and (4). Compare RUPA § 304. This error will be corrected in the "glitch bill." A statement of denial may be filed even if the partnership is not registered. *See* FRUPA § 304(2). The significance of this rule is minimal, inasmuch as the only other statement that may be filed without the partnership having been registered is a statement of dissociation. *See id.* §§ 105(4), 704(2).

87. A recorded statement has no legal effect on the authority of a partner to transfer partnership real property not held in the name of the partnership.

88. FRUPA § 303(3)(b). A statement of authority is accorded that effect only if it is properly recorded in the local real estate records. *Id.*

A recorded grant of authority is given conclusive effect only "so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then of record." *Id.* Thus, reliance on a partner's record authority is confined to situations in which there is no conflict among the recorded statements and amendments. A statement of denial also operates as a limitation on authority. *Id.* § 304. If the record is in conflict, the partner's actual authority must be determined outside the record. *See* RUPA § 303, cmt. 2. A cancellation of a limitation on a partner's authority, however, revives the previous grant of authority, so inadvertent conflicts can be resolved and reliance on the record restored. FRUPA § 303(3)(b) (last sentence).

Record authority is conclusive only if the transferee is "without knowledge to the contrary," that is, actual knowledge of a partner's lack of authority. *See id.* § 102(1). Thus, transferees are under no obligation to inquire, even if alerted to possible defects, since "notice" of a lack of authority does not preclude the record presumption of authority. *See id.* § 102(2). Sending a

authority to transfer real property in the ordinary course of the partnership's business, a statement of authority is most crucial in the transfer of partnership realty outside the ordinary course of business. In that situation, absent record authority, a transferee has the burden of proving that the partner had actual authority to execute the instrument of conveyance.⁸⁹

Not only is the partnership bound by a recorded grant of authority to transfer real property held in the name of the partnership, but third parties are deemed conclusively to *know* of a properly recorded limitation on a partner's authority to transfer such property.⁹⁰ In this way, a partnership can protect itself from unauthorized property transfers by rogue partners acting within their apparent authority. Absent a recorded limitation, every partner has apparent authority to transfer partnership property in the ordinary course of the partnership's business, unless the transferee knows (or has received a notification) of a partner's lack of authority.⁹¹ In effect, a recorded limitation of authority is conclusive as to the whole world's knowledge of the limitation.

Like grants of authority, recorded limitations are given binding effect only with respect to a partner's authority to transfer real property held in the name of the partnership.⁹² The authority of a partner to transfer partnership real property not held in the name of the partnership is entirely unaffected by recorded statements.⁹³

b. Other Transactions

With respect to all transactions other than the transfer of real property, statements of authority are accorded more limited effect. A filed

notification of a partner's lack of authority to a transferee is insufficient, unless it actually comes to the transferee's attention. Compare *id.* § 301(1) (apparent authority unless other party knew or received a notification).

89. See *id.* § 301(2), discussed *supra* note 67 and accompanying text.

90. FRUPA § 303(4).

91. See *id.* § 301(1).

92. If partnership property is held in the name of one or more of the partners, with or without an indication of the partner's partnership capacity or of a partnership's interest in the property, a search of the record would not reveal the partnership's interest, and thus reliance on the record would be unwarranted. To be protected from unauthorized transfers, therefore, a partnership must acquire and hold its real property in its own name.

Titled personal property is not accorded the same protection as real property because reliance on record title may not be appropriate. A filed limitation on a partner's authority might, however, be a source of actual knowledge of the partner's lack of authority, thereby cutting off the partner's apparent authority under FRUPA § 301(1).

93. That is not affirmatively stated in the Act, but is the negative implication of FRUPA § 303(3)(a), which covers the effect of a recorded statement "except for transfers of real property," and § 303(3)(b), which covers the effect with respect to the transfer of real property held in the name of the partnership. By its terms, § 303(4) applies only to limitations of authority to transfer real property held in the name of the partnership.

grant of authority is generally binding on the partnership, while a limitation on authority, in and of itself, has no legal effect.⁹⁴ Specifically, a grant of authority is conclusive in favor of a person who gives value without actual knowledge to the contrary, absent a recorded limitation.⁹⁵ Thus, the partnership is bound by a filed grant of extraordinary authority authorizing a partner to act beyond the usual course of business, unless the other party knows that the partner actually lacks such authority. A third party may rely on such a grant and has no duty to inquire further. However, third parties are not "deemed to know of a limitation" (apart from real property transactions) on the authority of a partner "merely because the limitation is contained in a filed statement" of authority.⁹⁶ Therefore, despite a limitation contained in a filed statement of authority, a partner continues to have at least apparent authority to act for the partnership in the ordinary course of the partnership's business, unless the other party actually knows (or has received a notification) of the limitation.⁹⁷ A third party may, however, actually learn of a filed limitation and thus know of the partner's lack of authority.

5. Revised Section 689.045, Florida Statutes

The Florida UPA has long contained a nonuniform provision intended to simplify establishing of record the authority to transfer real property held in the partnership name.⁹⁸ Despite the enactment of FRUPA's comprehensive system of recorded statements and the virtually absolute effect of those statements in determining of record a partner's authority to transfer real property held in the name of the partnership, the old Florida provision has been retained. Thus,

94. FRUPA § 303(5).

95. *Id.* § 303(3)(a).

96. *Id.* § 303(5). That is *not* true of limitations contained in a statement of dissociation or dissolution, which are in effect exceptions to the general principle embodied in FRUPA § 303(5). See *id.* §§ 704(4), 805(3), discussed *infra* notes 202-09, 219-21 and accompanying text.

97. FRUPA § 301(1). Thus, there is no need for third parties to monitor the Department of State's partnership records in order to protect themselves from a limitation contained in a filed statement of authority. But see *infra* text accompanying note 221 (discussing the need to monitor records for limitations based on a statement of dissociation or dissolution).

98. See FLA. STAT. § 620.605(1) (1995). The provision was added to UPA § 10(1) at the time Florida adopted the UPA. See 1972, Fla. Laws ch. 72-108, § 10, 351, 354. Section 620.605(1) provides:

When title is held in the partnership name and it is necessary to identify the partners at the time of a conveyance, encumbrance, or other instrument affecting partnership real property, one of the partners may execute an affidavit stating the names of the partners and that they are the partners then existing. The affidavit shall be conclusive as to the facts therein stated as to purchasers without notice.

FLA. STAT. § 620.605(1)(1995).

partnerships and their transferees have a choice as to the means used to establish the authority of a partner to transfer real property held in the name of the partnership.

As amended and relocated in section 689.045(3), *Florida Statutes*,⁹⁹ the alternative provision reads as follows:

When title to real property is held in the name of a limited partnership or a general partnership, one of the general partners may execute and record, in the public records of the county in which such partnership's real property is located, an affidavit stating the names of the general partners then existing and the authority of any general partner to execute a conveyance, encumbrance, or other instrument affecting such partnership's real property. The affidavit shall be conclusive as to the facts therein stated as to purchasers without notice.

Resort to section 689.045 has one distinct advantage: an affidavit may be filed and given effect even if the partnership is not registered with the Department of State. Filing an affidavit saves the cost and inconvenience of registration, as well as the higher fees for filing and recording statements under FRUPA. Moreover, Florida real property lawyers are undoubtedly more familiar and comfortable with section 689.045.

On the other hand, FRUPA's system of statements is both more precise and more comprehensive. Section 689.045 does not seem to contemplate the recording of a limitation on authority, nor does it provide for amendment or cancellation or for a statement of denial if another partner believes the affidavit to be in error. And were such an inconsistent affidavit recorded, section 689.045 does not provide for a resolution of the conflict between them. The precise effect to be accorded a section 689.045 affidavit is also unclear, especially the conclusive effect, under FRUPA, of a grant of authority "as to purchasers *without notice*."¹⁰⁰ Finally, there is no provision governing

99. 1995, Fla. Laws ch. 95-242, § 23, 2150, 2189. Chapter 689, *Florida Statutes*, is entitled Conveyances of Land and Declarations of Trust. For the original text of § 620.605(1), *Florida Statutes*, see *supra* note 98.

100. First, it is unclear what the purchaser must not have notice of, although presumably it is that the partner does not, in fact, enjoy the authority stated in the affidavit. More difficult, however, is the meaning and effect of such notice. FRUPA distinguishes between "knowledge" and "notice" and uses the two concepts carefully. See FRUPA §§ 102(1) (knowledge), 102(2) (notice). If the FRUPA concept of "notice" is used in applying § 689.045, it affords less protection to a purchaser than does FRUPA § 303(3)(b). Under FRUPA, a purchaser may rely on a partner's record authority unless the purchaser actually knows the partner lacks authority. Conversely, under § 689.045, a purchaser may not rely if she has reason to know of the partner's lack of authority because of what is known.

the interplay between a section 689.045 affidavit and the FRUPA regime, such as a recorded limitation on authority under FRUPA that conflicts with the authority conferred by a section 689.045 affidavit.

Because of this uncertainty, which is anathema with respect to the title to real property, it seems likely that title companies and lenders will prefer the FRUPA regime, and thus it may soon eclipse continued reliance on section 689.045 affidavits. Also, as RUPA gains national adoption, foreign purchasers and lenders will undoubtedly insist on the FRUPA regime because it will be better understood.¹⁰¹

F. Partner's Rights and Duties

1. Fiduciary Duties

One of the most controversial provisions in RUPA is the provision governing the fiduciary duties of partners.¹⁰² That controversy is more likely attributable to RUPA's attempt to articulate those duties clearly, rather than to any substantive changes wrought by the new Act. The UPA says little about a partner's fiduciary duties,¹⁰³ and most of the present law regarding a partner's fiduciary duties was judicially imported from the law of agency.¹⁰⁴ Thus, the substantive rules developed by the courts are not completely uniform and, perhaps more telling to the current debate, have not been articulated using a uniform or consistent analytical framework. For example, in the oft-cited case of *Meinhard v. Salmon*,¹⁰⁵ Justice Cardozo eloquently explained:

[Partners] owe to one another . . . the duty of finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market

101. In time, the FRUPA regime should far surpass § 689.045 in certainty because of the national body of case law construing the provision. There are no Florida cases construing the affidavit provision of § 620.605(1).

102. See *infra* note 108-13 and accompanying text.

103. Uniform Partnership Act § 21 is entitled "Partner Accountable as a Fiduciary" and is the only section dealing with such duties. The text of the UPA itself does not use the word "fiduciary."

104. Uniform Partnership Act § 4(3) provides that the law of agency shall apply under that Act. "Every partner is an agent of the partnership for the purpose of its business." UPA § 9(1); FRUPA § 301(1). The law of partnership reflects the broader law of principal and agent, under which every agent is a fiduciary. RUPA § 404, cmt. 1; see RESTATEMENT (SECOND) OF AGENCY § 13 (1957).

105. 164 N.E. 545, 546 (N.Y. 1928).

place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.

Of course, partners are *not* trustees, in the strict sense, and despite the colorful rhetoric the holding of the case was quite modest. Salmon, the managing partner of a term partnership that leased and operated a commercial property, was held to have breached his duty to Meinhard, a passive partner who provided the financing, by negotiating a lease renewal on his own behalf without notifying Meinhard and affording him the opportunity to compete with Salmon for the new lease.¹⁰⁶ Leaving open the question of whether Salmon could seek the lease renewal for himself, the court held he must nevertheless disclose to Meinhard his intention not to seek its renewal on the partnership's behalf.¹⁰⁷

Contractarians argue that broad and open-ended judicial assertions of fiduciary responsibility are an open invitation for disappointed partners to attempt to persuade sympathetic judges to apply personal notions of fairness as a basis for renegotiating partnership deals.¹⁰⁸ Instead, contractarians argue for a statutory restraint of judicial discretion, with an eye to discouraging litigation that would undo the parties' deal. Moreover, contractarians contend that whatever fiduciary duties are adopted should be only default rules, which the parties may waive in their entirety.

More traditional commentators, on the other hand, urge a more complete statement of fiduciary principles and statutory recognition of the judicial role of providing *ex post* review of allegedly opportunistic or unfair conduct.¹⁰⁹ For them, partnership is fundamentally relational and fiduciary in character, not merely contractual. Therefore, partners' fiduciary duties are immutable and cannot be reduced by the parties below a fundamental core, much less be waived in their entirety.

106. *Id.* at 547.

107. *Id.*

108. J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29 (1995); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 52-61 (1993); Larry E. Ribstein, *A Mid-Term Assessment of the Project To Revive the Uniform Partnership Act*, 46 BUS. LAW. 111, 137-41 (1990) [hereinafter *A Mid-Term Assessment*].

109. Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993); Claire M. Dickerson, *Is It Appropriate To Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111 (1993).

Not surprisingly, RUPA and the Revised Florida Act are something of a compromise.¹¹⁰ First, FRUPA section 404(1)¹¹¹ acknowledges the fiduciary nature of the partnership relationship by characterizing a partner's duties as "fiduciary." That section then limits the extent of those duties by providing that "the only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care as set forth in subsections (2) and (3)."¹¹² The intent of that provision is to reign in, by statutory edict, the propensity of some judges to tailor new fiduciary duties from whole cloth.¹¹³ This point obviously reflects a contractarian impulse.

a. *Duty of Loyalty*

First and most fundamentally, the Revised Florida Act makes clear that a partner is *not* a trustee and is not held to the same standards as a trustee. Section 404(5) provides that a partner does not violate his fiduciary duty "merely because the partner's conduct furthers the partner's own interest."¹¹⁴ Thus, a partner's rights as an owner and principal in the enterprise may be balanced against his duties as an agent and fiduciary in applying the duty of loyalty.¹¹⁵

110. Donald J. Weidner, the Reporter for the Revised Uniform Act, argues that RUPA "represents a major and sufficient move toward a contractarian statement of the law" and rejects the assertion "that partners should be free to contract away all their fiduciary duties." See Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationships*, 58 *LAW & CONTEMP. PROBS.* 81 (1995). He states:

First, individuals rarely "bargain" as equals for partnership agreements that completely define their relationship. The law should assume that the completely defined partnership relationship is the exception rather than the norm. It should also take into account the probability that the bargaining process involves human foible and important information asymmetries, if not outright fraud. Second, even apart from the imperfections of bargaining, prohibiting certain types of relationships is preferable to permitting them. Mandatory minima are designed to prevent types of relationships that would cost more than they would benefit. Finally, the language of fiduciary law, with its mandatory rules, is preferable to the language of the law of the sale of goods, with its mandatory rules. The language stating the minima among partners ought to reflect the texture of their relationship, which is one of a powerful mutual agency, ill-defined hierarchy, and joint and several liability. If the indeterminacy of the minima is kept in check, the benefit of the minima will far exceed the cost.

Id. at 82.

111. See FRUPA § 404(1). Section 404 is entitled "General Standards of Partner's Conduct." The title comes from § 8.30 of the Revised Model Business Corporation Act (RMBCA). See also FLA. STAT. § 607.0830 (1995) (General Standards for Directors).

112. FRUPA § 404(1).

113. See Vestal, *supra* note 109, at 537-45; *Reporters' Overview*, *supra* note 38, at 33. In light of the, common law tradition which spawned the concept of fiduciary duty, the ultimate success of the Act's efforts to limit that duty would seem problematic.

114. FRUPA § 404(5).

115. See RUPA § 404, cmt. 5. That principle may also be relevant in applying the obligation of good faith and fair dealing. See *infra* notes 133-35 and accompanying text.

Section 404(2) of the Revised Florida Act sets forth three specific rules that constitute a partner's duty of loyalty to the partnership and the other partners:

(a) A partner must account for any property, profit, or benefit derived by the partner from the partnership business or the use of partnership property, including the appropriation of a partnership opportunity;¹¹⁶

(b) A partner must not deal with the partnership as or on behalf of an adverse party;¹¹⁷ and

(c) A partner must not compete with the partnership.¹¹⁸

Despite the broad language often used by judges in the formulation of the duty of loyalty under prior law, the result will almost invariably be the same under one of FRUPA's three rules. Thus, any substantive change wrought by the Revised Florida Act is more apparent than real. On the other hand, FRUPA's enhanced specificity in the articulation of the rules will sharpen the legal analysis.

The Revised Uniform Act provides expressly that the three loyalty rules are exclusive.¹¹⁹ That provision was intended to prevent further judicial expansion of the duty of loyalty. The Revised Florida Act expressly provides to the contrary, stating that "a partner's duty of loyalty . . . includes, without limitation," the three enumerated duties.¹²⁰ The Florida drafters were concerned that the RUPA text too severely narrowed the duty of loyalty as fashioned by the courts over the years and therefore expressed a preference toward continued judicial development.¹²¹

The partnership agreement may not eliminate the duty of loyalty, but may "identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable."¹²² Thus, FRUPA affords the parties substantial leeway in drawing their own lines regarding the duty of loyalty, but ensures an irreducible core of

116. That rule is based on UPA § 21(1).

117. That rule is derived from §§ 389 and 391 of the RESTATEMENT (SECOND) OF AGENCY (1957). See RUPA § 404, cmt. 2.

118. That rule is derived from § 393 of the RESTATEMENT (SECOND) OF AGENCY (1957). The duty not to compete terminates upon the dissolution of the partnership or, under FRUPA § 603(2)(b), upon a partner's dissociation.

119. See RUPA § 404(b) ("A partner's duty of loyalty . . . is limited to the following . . .") (emphasis added).

120. FRUPA § 404(2).

121. See *id.* § 404, Fla. cmt. FLORIDA BAR CLE ON PARTNERSHIP LAW, *supra* note 65, at 66.

122. *Id.* § 103(2)(a)3.

fiduciary responsibility.¹²³ The specificity requirement prevents broad waivers and forces the partners to think about their consent to a co-partner's self-interest in terms of the types and categories of activities that are condoned. That specific recognition should also make it easier for courts to ascertain the intention of the parties in the event of litigation.¹²⁴ The "unless manifestly unreasonable" trump card gives courts a handle for refusing to enforce an unconscionable exculpatory clause. The mere possibility of judicial invalidation, by itself, should discourage overreaching by a partner with superior bargaining power or sophistication.

The Revised Florida Act also clarifies the right of partners under general law to consent to another partner's known prior or anticipated violation of a legal duty and to waive the right to redress for the violation.¹²⁵ *After full disclosure of all material facts*, a partner's specific self-interested act or transaction, not otherwise permitted by the Act or the partnership agreement, may be authorized or ratified by the other partners.¹²⁶ Consent must be unanimous, unless otherwise specifically provided in the partnership agreement.¹²⁷

b. Duty of Care

The UPA is silent regarding a partner's duty of care, and there is a dearth of judicial authority as to the existence of such a duty.¹²⁸ The Revised Florida Act explicitly provides that a partner owes a duty of care to the partnership¹²⁹ and the other partners. This duty "is limited to refraining from engaging in grossly negligent or reckless conduct,

123. That is a compromise between the traditional view that the fiduciary duty of loyalty cannot be waived *ex ante* and the contractarian view that the duty may be waived entirely. Both camps have been critical of the RUPA compromise. See *supra* notes 108-09 (citing authorities critical of the compromise).

124. See, e.g., *Singer v. Singer*, 634 P.2d 766 (Okla. Ct. App. 1981). In *Singer*, the court upheld a broadly worded exculpatory clause that probably would not be enforced under RUPA as drafted. If, however, the agreement were drafted to provide that the partners are free to compete with the partnership "with respect to the acquisition of mineral interests in the Britton area," it quite possibly would meet RUPA's specificity requirements. Given the Singers' sophistication and past practice, such an exculpatory provision might also pass muster under RUPA's "not manifestly unreasonable" standard. See Weidner, *supra* note 110, at 92-93.

125. See RUPA § 103, cmt. 5.

126. FRUPA § 103(2)(a)3.

127. *Id.*

128. See RUPA § 404, cmt. 3. A few courts have recognized a duty of care. See, e.g., *Rosenthal v. Rosenthal*, 543 A.2d 348, 352 (Me. 1988) (recognizing the duty of care not to act in grossly negligent manner).

129. FRUPA § 404(1).

intentional misconduct, or a knowing violation of law."¹³⁰ That standard of care reflects the policy that partners accept, as a cost of doing business, the risks of each other's ordinary negligence and should, therefore, share equally in the financial consequences.¹³¹ The duty of care is immutable and cannot be waived in its entirety, but the standard of care may be reduced in the partnership agreement, if the reduction is not unreasonable.¹³²

2. *Obligation of Good Faith and Fair Dealing*

In addition to the fiduciary duties of care and loyalty, which are rooted in the relational nature of partnership, the Revised Florida Act expressly recognizes an "obligation" of good faith and fair dealing, an obligation which reflects a partnership's contractual nature.¹³³ Section 404(4) provides that "[a] partner shall discharge the duties to the partnership and the other partners under this [A]ct or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." That is not an independent obligation, but is ancillary to a partner's discharge of every duty and exercise of every right, contractual or statutory.

"Good faith and fair dealing" has no well-established meaning. While "good faith" suggests a subjective element, "fair dealing" connotes an objective component. The concept is not defined in the Act, and its precise meaning is left to judicial development.¹³⁴ The

130. *Id.* § 404(3). A partner's duty of care extends to the conduct and winding up of the partnership business. *Id.* Upon a partner's dissociation, the duty continues "only with regard to matters arising and events occurring before the partner's dissociation, unless the partner participates in winding up the partnership's business." *Id.* § 603(2)(c).

131. *See Reporters' Overview, supra* note 38, at 22.

132. FRUPA § 103(2)(b). An agreement releasing a partner from liability for any action taken in good faith and in the honest belief that the action is in the best interests of the partnership would seem reasonable; an agreement absolving a partner of intentional misconduct is probably not. *See* RUPA § 103, cmt. 6. The partners may always agree to a heightened standard of care. *Id.*

133. *See id.* § 404, cmt. 4. The duty is recognized as an *implied* obligation of every contract by § 205 of the RESTATEMENT (SECOND) OF CONTRACTS (1981). *See, e.g.,* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 389 (Cal. 1988) (construing an employment agreement); *Gelder Medical Group v. Webber*, 363 N.E.2d 573, 577 (N.Y. 1977) (construing a partnership agreement). Many courts, however, articulate good faith and fair dealing as a component of the fiduciary duty of loyalty. *See, e.g.,* *Meehan v. Shaughnessy*, 535 N.E.2d 1255, 1263 (Mass. 1989); *Covalt v. High*, 675 P.2d 999, 1001 (N.M. Ct. App. 1983); *Wylar v. Feuer*, 149 Cal. Rptr. 626, 632 (Cal. Ct. App. 1978).

134. *See* RUPA § 404, cmt. 4. The UCC defines "good faith" as honesty in fact and, in the case of a merchant, the observance of reasonable commercial standards of fair dealing in the trade. *See* UCC §§ 1-201(19), 2-103(b). Some view good faith as an "excluder" with no intrinsic meaning of its own, better understood by what it rules out as bad faith. *See* Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provision of the Uniform Commercial*

obligation is immutable and cannot be eliminated in the partnership agreement, but the agreement may prescribe "standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable."¹³⁵

The Revised Florida Act makes it clear that a partner may lend money to and transact other business with the partnership, as to which the partner has the same rights and obligations as a non-partner.¹³⁶

3. Partner's Information Rights and Duties

Although not characterized as a fiduciary duty, the Revised Florida Act continues the UPA rule that all partners have full access to the partnership's books and records. This right extends to former partners with respect to books and records pertaining to the time they were partners.¹³⁷ Moreover, under FRUPA, a partner's right of access to the books and records is virtually absolute¹³⁸ and may not be unreasonably restricted in the partnership agreement.¹³⁹

The Revised Florida Act also continues a partner's right to obtain, on demand, any information concerning the partnership's business and affairs.¹⁴⁰ Under FRUPA, however, each partner and the partnership must also furnish to every partner, "[w]ithout demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [A]ct."¹⁴¹ That requirement is new and imposes on the partnership and partners individually

Code, 54 VA. L. REV. 195, 262 (1968). For a novel analysis of fiduciary duty and good faith as the opposite ends of the same continuum, see Claire M. Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955 (1995).

135. FRUPA § 103(2)(c). The language is drawn from UCC § 1-102(3). See RUPA § 103, cmt. 7.

136. FRUPA § 404(6). That is based on RULPA § 107. The partner's rights are subject to "other applicable law," such as equitable subordination and insider preference rules, which are not intended to be displaced. See RUPA § 404, cmt. 6.

137. FRUPA § 403(2). Compare UPA § 19. The right of access includes the right to inspect and, at the partner's expense, to copy books and records during ordinary business hours. FRUPA § 403(2).

138. See RUPA § 403, cmt. 2. Under FRUPA, a partner's right of access to the books and records is not conditioned on a proper purpose. Compare RMBCA § 16.02(c)(1) (shareholder must have proper purpose to inspect certain corporate records).

139. FRUPA § 103(2)(a)2.

140. *Id.* § 403(3)(b). Compare UPA § 20. The right to such information extends to the legal representative of a deceased partner or a partner under legal disability. FRUPA § 403(3). The partnership may refuse to provide information if either the demand or the information requested is unreasonable or otherwise improper. *Id.* § 403(3)(b).

141. *Id.* § 403(3)(a) (emphasis added).

an affirmative disclosure obligation.¹⁴² The precise scope and meaning of the duty is left to judicial development. Under FRUPA, neither of these information rights may be unreasonably restricted in the partnership agreement.¹⁴³

G. *New Breakup Rules*

The most dramatic changes effected by the Revised Florida Act concern the rules governing a partner's departure. Under the UPA, the departure of a single partner results inescapably in the "dissolution" of the partnership. Even if the business is continued by the remaining partners, a technical dissolution cannot be avoided.¹⁴⁴ Dissolution is the natural consequence of an aggregate theory of partnership. Moreover, absent agreement to the contrary, upon dissolution any partner has the right to have the business liquidated, its debts paid, and the surplus, if any, distributed in cash.¹⁴⁵ The result is a fragile form of business organization whose instability cannot be completely overcome by agreement.

The Revised Florida Act greatly simplifies the rules governing partnership breakup and enhances the stability of the enterprise. By embracing the entity theory of partnership, FRUPA invites a change in the fundamental notion that any partner's departure necessarily causes a dissolution of the partnership. To the contrary, under FRUPA, not every departure, or "dissociation," causes a "dissolution" and winding up, that is, a liquidation of the partnership business and the termination of the partnership entity.

The entity theory provides the conceptual framework for a continuation of the partnership business by the remaining partners. A partner's departure need have no effect on the continued existence of

142. Absent a demand, there is no express disclosure duty under the UPA. Under some circumstances, however, an affirmative disclosure duty has been inferred, either from other sections of the Act or the common law duty of good faith. See RUPA § 403, cmt. 3. The existence and scope of those duties were not well-developed under prior law. The Revised Florida Act § 403(3)(a) is not intended to be exclusive, and other affirmative disclosure duties may still be inferred from other provisions of FRUPA. See *id.*

143. FRUPA § 103(2)(a)2. Under RUPA § 103(b)(2), a partner's right of access to the partnership books and records is immutable, but a partner's other information rights are not, and thus the latter may be abolished by agreement.

144. Uniform Partnership Act § 29 defines "dissolution" as the change in the relationship caused by any partner's ceasing to be "associated" in the carrying on (as distinguished from the winding up) of the business. Under the UPA, the partnership is merely the aggregation of interests resulting from the "association" of the individual partners. See UPA § 6; *supra* notes 19-25 and accompanying text (discussing aggregate theory). With the departure of any partner, that association disappears, even if it is instantly replaced by *another* association with a similar cast of characters, save the departed partner. See UPA § 41 and general discussion; RUPA § 601, cmt. 1.

145. See UPA § 38(1).

the partnership entity. If the partnership is continued, the dissociated partner's economic interest will be bought out in a manner similar to the buyout of a departing shareholder's shares. If the partnership entity is not to continue, its business and affairs will be wound up.

That does not mean that a partner may be compelled to remain a partner. As under the UPA,¹⁴⁶ every partner has the power to dissociate at any time by express will, even in violation of the partnership agreement.¹⁴⁷ The Revised Florida Act continues the traditional policy that the mutual agency authority of partners, together with their personal liability for all partnership obligations, is so extraordinary that a person's status as a partner should always be terminable at will.

1. *Dissociation*

With one exception,¹⁴⁸ partners under FRUPA have complete freedom to decide what constitutes an event of dissociation. The partnership agreement may not abrogate the power of a court to expel a partner: 1) for misconduct that adversely affects the business; 2) for willful or persistent breach of fiduciary duty or of the partnership agreement; or 3) for conduct which makes it impracticable to carry on the business with that partner.¹⁴⁹ The Revised Florida Act sets forth the events that cause dissociation in the absence of a partnership agreement to the contrary.¹⁵⁰ Included are most of the traditional causes of "dissolution" under the UPA,¹⁵¹ such as a partner's death,¹⁵² incompetence,¹⁵³ bankruptcy,¹⁵⁴ or expulsion.¹⁵⁵

146. *Id.* § 31(2).

147. The Revised Florida Act § 602(1) expressly provides that a partner has the power to dissociate at any time, whether rightfully or wrongfully, by express will pursuant to FRUPA § 601(1). That rule is made immutable by FRUPA § 103(2)(d). *See infra* note 161 and accompanying text (discussing the consequence of wrongful dissociation).

148. FRUPA § 103(2)(e). As previously discussed, an agreement that purports to prevent a partner from dissociating at will is not specifically enforceable, but the breach of such an agreement may open the wrongfully dissociating partner to liability for consequential damages. *See infra* note 161 (discussing FRUPA § 602(3)).

149. FRUPA § 601(5). The partnership itself, or any other partner, has standing to seek the partner's expulsion. *Id.*

150. *Id.* § 601.

151. *See* UPA §§ 31, 32.

152. FRUPA § 601(7)(a). There are analogous events of dissociation for various types of entity partners. *See id.* § 601(8) (trust), (9) (estate), (10) (other entity).

153. *Id.* § 601(7)(b) (appointment of guardian or general conservator), (c) (judicial determination that a partner is incapable of performing duties).

154. *Id.* § 601(6)(a). Other indicia of financial distress are also included. *Id.* § 601(6)(b) (assignment for benefit of creditors), (c) (appointment of trustee, receiver, or liquidator), (d) (failure to vacate involuntary appointment).

Under the Revised Uniform Act, "debtor in bankruptcy" is defined as a person subject to an

2. *Wrongful Dissociation*

The Revised Florida Act continues the UPA concept of wrongful dissociation,¹⁵⁶ but simplifies and clarifies the applicable rules. Under FRUPA, a partner's dissociation is "wrongful" only if it is in breach of an express provision of the partnership agreement¹⁵⁷ or, in a term partnership, if the partner prematurely withdraws by express will in violation of the partnership agreement before the expiration of the term or the completion of the undertaking,¹⁵⁸ is expelled,¹⁵⁹ or is dissociated by becoming a debtor in bankruptcy.¹⁶⁰ A partner who wrongfully dissociates is liable to the partnership and to the other partners for damages caused by the dissociation.¹⁶¹ The grounds for wrongful dissociation may be varied in the partnership agreement, as may the consequences, or the concept may be abolished entirely.

order for relief under any chapter of the federal Bankruptcy Code (Title 11 of the United States Code), or a comparable order under federal, state, or foreign law governing insolvency. RUPA § 101(2) (emphasis added). Surprisingly, in light of the prevalence of foreign partners in Florida partnerships, FRUPA deletes the reference to foreign insolvency law. See FRUPA § 101(3)(b). Thus, in Florida, the partnership agreement must provide for a partner's dissociation by reason of a foreign bankruptcy proceeding, if that is the desired outcome.

155. In addition to judicial expulsion under FRUPA § 601(5) and expulsion pursuant to the partnership agreement under FRUPA § 601(3), the Act now affords a default right of expulsion by the unanimous vote of the partners if:

- (i) it is unlawful to carry on the business with the partner;
- (ii) the partner has made a voluntary assignment (other than a security interest) of substantially all of his partnership interest; or
- (iii) an entity partner has been dissolved or its right to conduct business suspended for more than 90 days without cure.

FRUPA § 601(4).

156. See UPA § 38(2), which provides special rules for a partner "who has caused the dissolution wrongfully." The term is not clearly defined, but includes a partner who has caused dissolution "in contravention of the partnership agreement." Under FRUPA, a partner's *dissociation* may be wrongful, but it does not result in a *dissolution* of the partnership. See FRUPA § 801(2)(a), discussed *infra* notes 164-67 and accompanying text.

157. FRUPA § 602(2)(a).

158. *Id.* § 602(2)(b)1. There is an exception if the partner withdraws within 90 days after the dissociation of another partner. *Id.* Thus, such a "reactive" dissociation is rightful. See *infra* notes 168-69 and accompanying text.

159. FRUPA § 602(2)(b)2. The dissociation is wrongful only if the partner is expelled by a court under FRUPA § 601(5). Thus, expulsion by the other partners under FRUPA § 601(3) or (4) is not a wrongful dissociation. The expulsion or willful dissolution of a partner that is a business entity is a wrongful dissociation, however. *Id.* § 602(2)(b)4.

160. *Id.* § 602(2)(b)3. That rule recognizes that a person may file bankruptcy today with little financial or reputational loss, thereby creating a loophole by which a partner could file bankruptcy in lieu of withdrawing from a term partnership.

161. *Id.* § 602(3).

3. *Dissolution and Winding Up*

Under FRUPA, whether the partnership entity is to be continued or dissolved upon a partner's dissociation is left almost completely to the agreement of the partners. The only significant constraint on the continuation of a partnership by agreement is a partner's immutable right to seek a judicial dissolution and winding up of the partnership.¹⁶²

The partnership agreement may specify what events will cause a winding up of the business.¹⁶³ To the extent that the partnership agreement does not provide otherwise, the Act sets forth the default events of dissolution.¹⁶⁴ For a term partnership,¹⁶⁵ those events include the

162. See *id.* § 103(2)(f). The reference in that section to FRUPA § 601 is erroneous; the reference should be to FRUPA § 801. Compare RUPA § 103(b)(8). The error will be corrected in the "glitch bill."

The FRUPA § 801(5) grounds for judicial dissolution are:

- (i) the partnership's economic purpose is likely to be unreasonably frustrated;
- (ii) another partner has acted so as to make it impracticable to carry on the business with that partner; or
- (iii) it is not otherwise reasonably practicable to carry on the business in conformity with the partnership agreement.

The Uniform Partnership Act § 32(1) provides for judicial dissolution. The new language is drawn from RULPA § 802. See RUPA § 801, cmt. 8.

The Revised Florida Act § 801(6) provides for judicial dissolution on application of a transferee of a partner's interest in the partnership. That right is also immutable. FRUPA § 103(2)(f).

The only other immutable cause of dissolution is an event making it unlawful to continue the partnership business. See *id.* §§ 103(2)(f), 801(4).

163. *Id.* § 801(3).

164. See *id.* § 801. The Revised Florida Act retains the word "dissolution," as does RUPA, but its meaning is not the same as under the UPA. Under UPA § 29, dissolution refers to the change in the relation of the partners caused by the departure of any partner, which is a fundamental change under the aggregate theory of partnership. Under the entity theory, the partnership entity continues until the business has been wound up. "Dissolution," as it is used in FRUPA, is merely a shorthand way of noting that the winding up process has begun. Thus, it is redundant to say, as does FRUPA § 801, that a partnership "is dissolved and its business must be wound up."

Early drafts of RUPA did not use the term "dissolution," and the Revised Texas Act, which is based on an earlier draft of RUPA, does not use the term "dissolution." See Texas Revised Partnership Act, TEX. REV. CIV. STAT. ANN. art. 6132b-8.01 (West 1995). For a more complete discussion of the new meaning of "dissolution," see *Reporters' Overview*, *supra* note 38, at 8.

165. The Revised Florida Act does not define "term partnership." As used in FRUPA, it means a partnership that is *not* a "partnership at will." "Partnership at will" is defined as a partnership "in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking." FRUPA § 101(7). Thus, a term partnership is one in which the partners have agreed to remain partners for a definite term or a particular undertaking.

The distinction is critical, since the grounds for dissolution under FRUPA § 801 differ depending on whether the partnership is a term partnership or an at-will partnership. The

expiration of the term or the completion of its undertaking,¹⁶⁶ as well as the express will of all the partners.¹⁶⁷

FRUPA also provides for the so-called "reactive" dissolution and winding up of a term partnership following a partner's dissociation by death, incompetence, bankruptcy, or other specified cause or wrongful dissociation in breach of the partnership agreement.¹⁶⁸ In those events, the partnership is dissolved and its business must be wound up unless, within ninety days, a majority in interest of the remaining partners agree to continue the partnership.¹⁶⁹

The Revised Uniform Act continues the UPA rule that a partnership at will is dissolved and must be wound up upon the express will of any partner to withdraw.¹⁷⁰ That was one of the most controversial issues in the drafting of the new Act, and many thought that the decision to wind up the business should be left to a majority of the remaining partners.¹⁷¹ Considerable difference of opinion (but no

distinction is also crucial in determining whether a partner's dissociation is wrongful under FRUPA § 602(2)(b). Where the partnership agreement is not clear, the result depends upon the intention of the partners, which is a question of fact. In close cases, courts often infer a term or undertaking from the partnership's purpose. *See, e.g., Baker v. City of Orlando*, 427 So. 2d 1130 (Fla. 5th DCA 1983) (purpose to complete a single construction contract); *see also* RUPA § 101, cmt. (citing cases).

166. FRUPA § 801(2)(c).

167. *Id.* § 801(2)(b). That follows the general rule that any transaction outside the ordinary course of business or an amendment to the partnership agreement requires unanimous consent. *Id.* § 401(10).

168. *See id.* § 801(2)(a).

169. *Id.* Allowing a majority of the partners to continue the business is a change in the law. Under the UPA, unanimous consent is required to continue the business of a term partnership following the premature departure of one partner, thus giving each of the remaining partners a right to dissolution. *See* UPA § 38(2)(b). This broad dissolution power was viewed as inappropriate in light of the partners' original agreement to continue the partnership for a definite term or particular undertaking. In effect, FRUPA allows the remaining partners to decide collectively whether the first partner's premature departure jeopardizes the successful continuation of the business. If the business is continued by the majority, any dissenting partner who wishes to withdraw may rightfully do so under the exception to FRUPA § 602(2)(b)1. *See* RUPA § 801, cmt. 5. The interest and vote of a partner who dissociates rightfully under FRUPA § 602(2)(b)1 is counted in determining whether a majority in interest agrees to continue.

Majority in interest is not the normal FRUPA default rule for partnership business. *See* FRUPA § 401(10) (majority of the partners). Requiring a majority in interest satisfies Internal Revenue Service concerns regarding a partnership's continuity of life. *See* Treas. Reg. § 301.7701-2(b)(1). "Majority in interest" is not defined in FRUPA, but is intended to satisfy Rev. Proc. 94-45 (June 29, 1994). The "in-interest" concept refers to partners' economic interests in both profits and capital of the partnership. *See* RUPA § 801, cmt. 5. Those concerns may soon be eliminated, if the IRS's recent "check-the-box" proposal is adopted. *See supra* note 25.

170. RUPA § 801(1). The dissolution occurs when the partnership has notice of the partner's will to withdraw, unless a later date is specified by the partner. A partner at will who has already been dissociated by expulsion, bankruptcy, incompetency, or otherwise under RUPA § 601(2) through (10) is not entitled to have the partnership wound up. *Id.* § 801(1).

171. *See, e.g., A Mid-Term Assessment, supra* note 108, at 148-50.

empirical evidence) existed as to the relative likelihood of opportunistic abuse by the majority or the minority. Ultimately, the drafters decided to retain the traditional rule giving every partner in an at-will partnership the right to have the business wound up. It is only a default rule, and the partnership agreement may provide that a departing partner is not entitled to have the business wound up but must be bought out by the remaining partners. The Revised Florida Act provides likewise.¹⁷²

"Dissolution" is merely the beginning of the winding up process.¹⁷³ The partnership entity continues after dissolution, although the scope of its business is limited to the purpose of winding up its affairs.¹⁷⁴ But winding up is not an irreversible process. At any time before the winding up is completed, the partners may agree not to wind up and terminate the partnership, but rather to resume carrying on the partnership's business.¹⁷⁵ After dissolution, the consent of all the partners, including any rightfully dissociating partner, is required to resume the business, since, in effect, the partners are waiving their right to have the assets sold and the liabilities satisfied.¹⁷⁶ If all the partners consent, the partnership resumes carrying on its business as if dissolution had never occurred, and any liability incurred by the partnership after the winding up began is determined as if there had been no dissolution.¹⁷⁷ The rights of third parties who act in reliance on the dissolution, without knowledge (or a notification) of the waiver, are protected.¹⁷⁸

4. *Buyout of Dissociated Partner's Interest*

If a partner's dissociation does not result in a dissolution and liquidation of the partnership business, the dissociated partner's interest in the partnership must be purchased by the partnership or the remaining

172. FRUPA § 801(1).

173. See *supra* note 164.

174. See FRUPA § 802(1). The curtailment of the partnership's purpose after dissolution results in a similar curtailment of the partners' actual authority. See *id.* § 804(1).

After dissolution, the partnership's business may be preserved as a going concern for a reasonable time in order to preserve its going concern value. See *id.* § 803(3). When the winding up of its business is completed, the partnership is terminated. *Id.* § 802(1).

175. *Id.* § 802(2)(a).

176. *Id.* § 802(2). A dissociating partner's waiver of the right to dissolution means that the dissociating partner's interest will be bought out. The need for her consent to resume the business should give the departing partner the necessary leverage to negotiate a fair buyout price. Under § 802(2), the consent of a *wrongfully* dissociating partner is not required, because such a partner never had a right to have the business liquidated.

177. *Id.* § 802(2)(a).

178. *Id.* § 802(2)(b).

partners.¹⁷⁹ If the partnership agreement does not provide otherwise, and the parties cannot agree *ex post* on the amount the dissociating partner is to receive or on the other terms and conditions of the buyout, the FRUPA default rules apply.

Under the default rules, the buyout price is the amount that would have been distributable to the dissociating partner if, on the date of dissociation, the partnership's assets and business had been sold, its liabilities satisfied, and the surplus distributed.¹⁸⁰ Thus, the buyout price is determined by a hypothetical liquidation as of the date of dissociation. The Act specifically provides that the hypothetical sale price of the business is the *greater* of the going concern value of the entire business *without the dissociating partner* or the liquidation value of its assets.¹⁸¹ In winding up the partnership's business, all of its liabilities must be paid before any surplus is distributed to the partners;¹⁸² thus, the buyout price is the net of all known liabilities.¹⁸³ Damages for wrongful dissociation¹⁸⁴ and all other amounts owing from the

179. *Id.* § 701(1). That section literally provides that the partnership must "cause" the dissociated partner's interest to be purchased. That is intended to accommodate a purchase by one or more of the remaining partners or a new investor. *See id.* § 701, cmt. 2. The buyout price and terms of the buyout may be varied by the partnership agreement. Although § 701 is not made immutable by FRUPA § 103(2), a partnership agreement that provides for a total forfeiture of a partner's interest upon dissociation would probably not be enforced under general law. *See Jones v. Chester*, 363 S.W.2d 150, 157 (Tex. Ct. App. 1962) (forfeiture of partner's entire interest upon dissolution is unconscionable and unenforceable). In that sense, a buyout is mandatory.

180. FRUPA § 701(2).

181. *Id.* "Buyout price" is a new term. The drafters intended that its meaning be developed as an independent concept appropriate to the context of a partnership buyout. Traditional terms, such as "fair value" or "fair market value," were not used because they have become terms of art in some contexts. *See RUPA* § 701, cmt. 3.

Liquidation value is not intended to mean distress sale value. Under either the going concern or liquidation value standard, the hypothetical selling price should be the price that a willing and informed buyer would pay a willing and informed seller, with neither being under any compulsion to deal. Going concern value is intended to negate any notion of a minority discount. Other discounts, such as for a lack of marketability, may be appropriate. *Id.*

182. *See* FRUPA § 807(1).

183. The Revised Florida Act does not expressly address whether only known liabilities are taken into account in determining the buyout price or whether unknown liabilities may also be considered. When a partnership's business is actually wound up under Article 8, every partner remains jointly and severally liable for all partnership debts and must contribute the amount necessary to satisfy any partnership obligations that were unknown at the time the business was wound up and the partners' "final" accounts were settled. *See* FRUPA § 807(4). This contingent liability continues until the statute of limitations has run on all partnership obligations. Thus, in determining the buyout price of a dissociated partner's interest in the partnership, it would seem appropriate to take known contingent liabilities into account in the hypothetical liquidation, and arguably the value of the partner's interest should be discounted for unknown liabilities. It is clear, however, that § 701(2) provides an incentive for the partnership to disclose all known liabilities, however remote or contingent, and an incentive for the dissociating partner to withhold information about possible obligations known only to her.

184. *See* FRUPA § 602(3), discussed *supra* note 161 and accompanying text.

dissociated partner to the partnership, *whether or not then due*, are offset against the buyout price.¹⁸⁵ Interest on the buyout price must be paid from the date of dissociation to the date of payment.¹⁸⁶ If the parties cannot agree on the value of the partnership's business, and thus the buyout price of the partner's interest in the partnership, FRUPA provides rather detailed procedures for obtaining a judicial determination of the buyout price and the payment terms.¹⁸⁷

Briefly, the statutory default procedure requires the dissociated partner to make a written demand for payment.¹⁸⁸ If the parties cannot agree on the buyout price within 120 days thereafter, the partnership must tender payment in cash of the amount it estimates to be the price, subject to any offsets provided by the Act.¹⁸⁹ The partnership must also provide the dissociated partner with a list showing the firm's assets and liabilities as of the date of dissociation, as well as the most recent balance sheet and income statement (if any), an explanation of how the estimated buyout price was calculated, and written notice that the dissociated partner has 120 days to commence an action to determine the buyout price or be bound by the amount of the tendered payment.¹⁹⁰ If suit is brought, the court will determine the buyout price of the dissociated partner's interest, any offsets due under the Act, and accrued interest.¹⁹¹ The court may also assess attorney's fees and expenses, such as appraiser's fees, if the court finds that either party acted arbitrarily, vexatiously, or not in good faith;

185. FRUPA § 701(3). Therefore, the offset might include damages for the dissociating partner's breach of the partnership agreement or of her fiduciary duties or for partnership debts incurred by the partner without actual authority. Under FRUPA, the partnership itself has standing to maintain an action for such relief. *See id.* § 405(1).

Other amounts then due from the partnership to the dissociating partner may be offset under general law against the buyout price. There is no provision for the *acceleration* of amounts due to the dissociating partner, however. Thus, repayment of a term loan that is not yet due made to the partner by the partnership is accelerated and offset, but such a loan made by the partner to the partnership is not; the latter need not be repaid until actually due. The partnership agreement or the loan agreement may, of course, provide for the acceleration and setoff of a partner's loan to the partnership.

186. FRUPA § 701(2). The Revised Florida Act § 104(2) provides that the default interest rate is that specified in § 687.01, *Florida Statutes*, which, in the absence of a contract, is the statutory rate of interest. Section 687.01 sets that rate as the rate provided for in § 55.03. The rate is currently 10% per annum.

187. *See* FRUPA § 701(5)-(9); RUPA § 701, cmts. 6-10. For a more complete discussion of the buyout procedure, *see Reporters' Overview, supra* note 38, at 10-13.

188. FRUPA § 701(5). The dissociated partner's written demand triggers the other buyout rules.

189. *Id.*

190. *Id.* § 701(7).

191. *Id.* § 701(9). The action must be brought within 120 days after the partnership has tendered payment of the amount it believes is due or, if no payment is tendered, within one year after the dissociated partner's written demand for payment. *Id.*

such conduct would include the partnership's failure to tender payment or otherwise comply with the Act's requirements.¹⁹²

In addition to the buyout price for a dissociated partner's interest in the partnership, FRUPA provides that the partnership must indemnify the dissociated partner against all partnership liabilities.¹⁹³ The indemnification covers all liabilities, whether incurred before or after the partner's dissociation, except liabilities incurred by the partner after his dissociation and without actual authority but which are binding on the partnership because of the partner's lingering apparent authority.¹⁹⁴ Indemnifying a dissociated partner is appropriate because the buyout price of the dissociated partner's interest is based on the net value of the partnership's assets and business, less liabilities, and as between the partners he should not have to pay again if sued by a creditor.

5. *Dissociated Partner's Lingering Agency Authority and Personal Liability*

The Revised Florida Act provides comprehensive rules for winding down a partner's lingering apparent authority and personal liability upon dissociation. The Act also authorizes the filing of a statement of dissociation that is deemed to be constructive notice of a partner's dissociation and significantly limits his lingering authority and liability.

a. *Apparent Authority*

Under FRUPA, a dissociated partner has apparent authority for up to one year after dissociation to bind the partnership by an act which apparently carries on the partnership's business in the ordinary

192. *Id.*

193. *Id.* § 701(4). A partner's dissociation does not of itself discharge the partner's liability for all partnership obligations incurred while she was a partner. *Id.* § 703(1). A dissociated partner may also be held personally liable to partnership creditors for debts incurred by the partnership for up to one year after the partner's dissociation. *Id.* § 703(2). The indemnification required by § 701(4) covers a dissociated partner's lingering liability for both old and new debts.

In principle, the indemnification required by § 701(4) is overinclusive because it protects the dissociated partner from unknown future liabilities that could not have been taken into account in determining the value of her interest but for which she would have been liable for contribution if the partnership were liquidated.

194. *Id.* § 701(4). A dissociated partner's apparent authority to bind the partnership may linger for up to one year after dissociation. *See id.* § 702(1), discussed *infra* notes 195-98 and accompanying text.

course.¹⁹⁵ Under the Revised Uniform Act, however, a dissociated partner's apparent authority may continue for as long as two years.¹⁹⁶ The partnership is bound only if at the time of the transaction the other party reasonably believed that the dissociated partner was then a partner and the other party had *no notice* of the partner's dissociation.¹⁹⁷ Thus, there must have been reasonable reliance on the partner's continued status as a partner. As a practical matter, the other party must previously have transacted business with the dissociated partner. The partnership can attempt to cut off the dissociated partner's apparent authority by immediately sending a notification of his dissociation to all known parties who had previously dealt with him. The dissociated partner is liable to the partnership for any damage arising from an obligation incurred by the partner after his dissociation.¹⁹⁸

b. Personal Liability

A partner's dissociation does not of itself discharge his liability for partnership obligations incurred before dissociation.¹⁹⁹ Under FRUPA, a dissociated partner is not, however, liable for partnership obligations incurred after his dissociation, except those incurred within one year of the partner's dissociation if the other party had no notice of the dissociation and reasonably believed the dissociated partner was still a partner.²⁰⁰ Under the Revised Uniform Act, a dissociated partner's exposure for new obligations is two years,²⁰¹ similar to the duration of his lingering apparent authority. A dissociated partner can, however, limit his lingering liability for new partnership

195. FRUPA § 702(1) (providing that the partnership is bound by a dissociated partner's act which would have bound it under FRUPA § 301 before the partner's dissociation). For a discussion of § 301, see *supra* notes 65-69 and accompanying text.

196. RUPA § 702(a).

197. FRUPA § 702(1). The statute is somewhat redundant because a party with notice of the partner's dissociation obviously cannot reasonably believe the dissociated partner is still a partner. "Notice" is defined in FRUPA § 102(2). For clarity, FRUPA § 702(1)(c) further provides that the dissociated partner's apparent authority is cut off if the other party to the transaction is "deemed" to have had either knowledge under § 303(4) by reason of a recorded statement of dissociation or notice under § 704(4) by reason of a filed statement. The effect of a statement of dissociation is discussed *infra* notes 202-09 and accompanying text. The reference in FRUPA § 702(1)(c) to § 303(5) is in error. The reference should be to § 303(4). Compare RUPA § 702(a)(3). This error will be corrected in the "glitch bill."

198. FRUPA § 702(2).

199. *Id.* § 703(1).

200. See *id.* § 703(2). Section 703(2)(c), like § 702(1)(c), contains an incorrect reference to § 303(5). The correct reference is § 303(4). Compare RUPA § 703(b)(3). This error will be corrected in the "glitch bill."

201. RUPA § 703(b).

obligations to parties with whom he has dealt as a partner by sending them an immediate notification of his dissociation.

c. Statement of Dissociation

The Revised Florida Act provides a more efficient and reliable means of cutting off a dissociated partner's lingering apparent authority and personal liability for new partnership obligations, however. Either the dissociated partner or the partnership may file a statement of dissociation,²⁰² which operates as a limitation on the partner's record authority under the usual rules applicable to record authority.²⁰³ A properly recorded statement of dissociation in the real property records conclusively terminates the dissociated partner's authority to transfer real property held in the name of the partnership.²⁰⁴ Filing a statement with the Department of State does *not* limit the dissociated partner's apparent authority in any other type of transaction unless the other party to the transaction actually knows of the partner's dissociation.²⁰⁵

Contrary to the usual rule governing the effect of a filed limitation of authority, FRUPA provides that, for the purposes of the rules governing a dissociated partner's lingering apparent authority²⁰⁶ and personal liability for new partnership obligations,²⁰⁷ third parties are *deemed conclusively* to have notice of the partner's dissociation ninety days after the statement of dissociation is filed.²⁰⁸ Thus, a dissociated partner's lingering apparent authority and personal liability for new partnership obligations can be absolutely terminated in ninety days by filing a statement of dissociation. That gives both the partnership and the dissociated partner a strong incentive to file a statement of dissociation. Moreover, as an exception to the general rule in Florida, a statement of dissociation may be filed even if the partnership has not previously registered with the Department of State.²⁰⁹

202. FRUPA § 704(1). A statement of dissociation may be filed even if the partnership has not registered with the Department of State. *Id.* § 704(2).

203. *Id.* § 704(3).

204. *See id.* § 303(4), discussed *supra* note 90 and accompanying text.

205. *See id.* § 303(5), discussed *supra* notes 96-97 and accompanying text.

206. *See id.* § 702(1), discussed *supra* notes 195-97 and accompanying text.

207. *See id.* § 703(2), discussed *supra* note 200 and accompanying text.

208. *Id.* § 704(4). The Revised Florida Act § 704(3) provides that a statement of dissociation is also a limitation on the authority of a dissociated partner for the purposes of § 303(5) and (6). Those cross references to § 303(5) and (6) are in error. The correct references are to § 303(3) and (4). Compare RUPA § 704(b). The error will be cured by the "glitch bill."

209. FRUPA § 704(2). Under FRUPA § 105(4), registration with the Department of State is generally a condition precedent to filing statements under FRUPA. *See supra* note 43 and accompanying text (discussing registration).

While FRUPA's constructive notice regime for statements of dissociation provides benefits to partners and partnerships, it imposes a cost on third parties doing business with partnerships. That is because third parties must check the records of the Department of State at least every ninety days if they wish to rely on the apparent authority of a person known to have been a partner or if they are extending credit to the partnership on the strength of that person's personal credit.

6. *Winding Up the Partnership's Business*

The Revised Florida Act greatly clarifies the rules governing the rights and duties of the partners in winding up the partnership's business after an event of dissolution.

After dissolution, any partner may participate in winding up the partnership's business.²¹⁰ Winding up includes the sale of all partnership assets, either as a going concern or otherwise, payment or discharge of all partnership liabilities, and distribution of the surplus, if any, to the partners in accordance with their rights to distributions.²¹¹

Each partner is entitled to a settlement of all partnership accounts upon winding up the business.²¹² In settling the accounts, the profits and losses that result from the liquidation of the partnership assets must be credited and charged to the partners' accounts.²¹³ A partner with a positive account balance will receive a final liquidating distribution in that amount, while a partner with a negative account balance must contribute the difference to the partnership.²¹⁴

7. *Partners' Agency Authority After Dissolution*

After an event of dissolution, the partnership continues only for the purpose of winding up its business,²¹⁵ and the scope of the partners'

210. FRUPA § 803(1). A wrongfully dissociated partner may not participate in the winding up, however. *Id.* Any partner may, for good cause, request that a court supervise the winding up. *Id.*

211. See *id.* §§ 803(1), (3), 807(1). Final distributions to the partners must be in cash, unless otherwise agreed. *Id.* § 807(1).

212. *Id.* § 807(2).

213. *Id.* One of FRUPA's significant contributions is the creation of a default system of partnership accounting. The Revised Florida Act § 401(1) provides that each partner is deemed to have an account that is credited with the amount of the partner's capital contributions and share of the profits. All distributions to the partner and the partner's share of the losses are charged to the account. That establishes a rudimentary system of partner capital accounts, the generally accepted method of partnership accounting. The Revised Florida Act § 807(2) provides for closing out those accounts upon winding up.

214. FRUPA § 807(2). That is only a default rule. The partners may agree that a negative account balance does not reflect a debt to the partnership and need not be repaid in settling the partners' accounts. See RUPA § 807, cmt. 3.

215. FRUPA § 802(1).

actual authority contracts accordingly.²¹⁶ A partner's usual apparent authority continues, however, if the other party to the transaction does not have *notice* of the dissolution.²¹⁷ A partner who, knowing of the event of dissolution, nevertheless incurs a partnership liability that is inappropriate for winding up the business is liable to the partnership for any damage caused.²¹⁸

The partnership's exposure to liability for a partner's inappropriate obligation may be limited, however, by filing a statement of dissolution.²¹⁹ A filed statement of dissolution cancels a filed statement of authority,²²⁰ and after ninety days third parties are conclusively deemed to have notice of the dissolution and, accordingly, of the limitation on the authority of all of the partners.²²¹

H. "Safe Harbor" for Partnership Conversions and Mergers

Adoption of the entity theory also facilitates partnership conversions and mergers which, although now quite common, are fundamentally inconsistent with the aggregate theory. Not surprisingly, then, the UPA is silent on the subject. Article 9 of the Revised Florida Act provides much needed certainty as to the validity of such transactions and their legal effect on the rights and liabilities of the partners and the title to partnership property.

216. Thus, after dissolution, the partnership is bound by a partner's act that is appropriate for winding up the business, and each partner is liable to the other partners for her share of any partnership liability incurred in winding up. *See id.* §§ 804(1), 806(1).

217. *Id.* § 804(2). That is a slight change from a partner's usual apparent authority under FRUPA § 301(1), which provides that the partnership is bound by a partner's act in the ordinary course of business unless the other party *knew or had received a notification* of the partner's lack of authority. Under § 804(2), the partnership is not bound by an act inappropriate for winding up if the other party *should have known* of the dissolution.

218. *Id.* § 806(2).

219. *See id.* § 805(1). Any partner who has not wrongfully dissociated may file a statement of dissolution. *Id.* In Florida, a statement of dissolution may not be filed unless the partnership is registered with the Department of State. *See id.* § 105(4), discussed *supra* note 43 and accompanying text.

220. FRUPA § 805(2). The statement must be properly recorded to be a limitation on a partner's authority to transfer real property held in the name of the partnership. *Id.* § 303(4), discussed *supra* note 90 and accompanying text. The error in FRUPA § 704(3) is repeated in FRUPA § 805(2). *See supra* note 208. The cross references to §§ 305(5) and 303(6) are incorrect. They should refer to § 303(3) and (4). Compare RUPA § 805(b). This error will be cured in the "glitch bill."

221. FRUPA § 805(3). Thereafter, a dissolved partnership may file and record a new statement of partnership authority granting authority to one or more of the partners to transfer partnership property during the winding up period (or limiting the authority of a partner to do so). The new statement of partnership authority is binding on the partnership and third parties as provided in FRUPA § 303(3) and (4), whether or not the transaction is appropriate for winding up the partnership business. FRUPA § 805(4). Again, the cross-references to FRUPA § 303(5) and (6) are in error and will be corrected in the "glitch bill". Compare RUPA § 805(d).

Article 9 is only a "safe harbor." Its requirements are neither mandatory nor exclusive,²²² and partnerships may be converted or merged in any other manner provided by law.²²³ If the transaction conforms to the requirements of Article 9, the conversion or merger is valid and will enjoy the legal effect provided in the Act.²²⁴ It is likely that Article 9 will be followed in most cases because it adds comfort to lawyers rendering opinion letters as to the validity and effect of such transactions.

1. Conversions

The key procedural safeguard in the conversion of a partnership or limited partnership is the requirement that it be unanimously approved by all of the partners,²²⁵ including limited partners.²²⁶ Florida adds the requirement that all partners be promptly notified of a conversion to a limited partnership and provided a copy of the statutory section governing the conversion and the partners' liability for the converted partnership's obligations.²²⁷ In light of the Act's concern over exposing a former limited partner to personal liability as a general partner of the converted partnership where the partner lacks knowing consent, it is strange that Florida does not impose a similar

222. FRUPA § 908.

223. *Id.* Some state limited partnership acts authorize the conversion of a limited partnership to a general partnership or the merger of limited and general partnerships, while other states have adopted so-called cross-entity merger and conversion statutes. Those procedures may be followed. See RUPA § 908, cmt.

224. See FRUPA §§ 904(1) (effect of conversion), 906(1) (effect of merger).

225. See *id.* §§ 902(2) (general to limited partnership), 903(2) (limited to general partnership). Section 902(2) provides a narrow exception for approval of the conversion of a general to a limited partnership by a lesser number or a percentage specified for conversion in the partnership agreement. Section 903(2) expressly provides that the approval of the conversion of a limited to a general partnership must be unanimous, notwithstanding a provision to the contrary in the limited partnership agreement. That safeguard protects a limited partner from exposure to personal liability as a general partner unless the partner clearly and knowingly consents. See RUPA § 903, cmt.

226. The Revised Florida Act § 901 provides several definitions that are unique to Article 9. For example, the term "partner," standing alone, includes both general and limited partners. *Id.* § 901(4). The term "partnership," as used in Article 9, retains its usual FRUPA definition meaning a partnership formed under FRUPA § 202, that is, a general partnership. FRUPA § 101(4).

227. *Id.* § 902(6). It is difficult to see how the conversion could be approved by a partner who did not have notice of it. FRUPA § 103(2)(g), itself a nonuniform addition to RUPA's list of immutable rules, further provides that the Florida notice requirement may not be changed in the partnership agreement. That addition to the list of immutable rules is misguided. Article 9 itself accomplishes the purpose by according "safe harbor" validity and certainty only to conversions and mergers where the dictates of Article 9 have been followed. Thus, failure to give the required notice would leave the conversion or merger outside the peaceful waters of Article 9's safe harbor.

notice requirement on the conversion of a limited partnership to a general partnership.

The Revised Florida Act carefully spells out the extent to which a partner is liable for the partnership's obligations after conversion. A former general partner who becomes a limited partner remains personally liable for all obligations incurred before the conversion while he was a general partner.²²⁸ That protects the rights of old partnership creditors who could look to the partners personally at the time credit was extended.

The newly minted limited partner may also be held personally liable for any new obligation incurred by the converted partnership within ninety days of the conversion, if the other party to the transaction reasonably believes that the limited partner is still a general partner.²²⁹ That is a variation of the lingering liability rule applicable to a dissociated partner and, in effect, treats third parties dealing with the converted partnership as having constructive notice of a limited partner's new status ninety days after the conversion.²³⁰ Thereafter, a limited partner's liability for the obligations of the converted partnership is the same as any other limited partner under the Florida Revised Uniform Limited Partnership Act.²³¹

A limited partner who becomes a general partner as the result of a conversion is liable as a general partner only for those obligations of the converted partnership that are incurred after the conversion; he remains only limitedly liable for old obligations incurred before the conversion.²³²

2. *Effect of Conversion*

Most fundamentally, the Revised Florida Act makes clear that a partnership or limited partnership that has been converted pursuant to Article 9 "is for all purposes the same entity that existed before the conversion."²³³

228. FRUPA § 902(5).

229. *Id.*

230. See *supra* notes 207-08 and accompanying text. Although FRUPA does not authorize the filing of a statement of conversion, the conversion of a general to a limited partnership does not take effect until a certificate of limited partnership is filed. FRUPA § 902(4). Under § 620.108(1)(c), *Florida Statutes*, the certificate must include the name of each general partner.

231. FRUPA § 902(5). The liability of a limited partner is governed by § 620.129, *Florida Statutes*.

232. FRUPA § 903(5). Obviously, a partner who remains a general partner of the converted limited partnership is personally liable for all partnership obligations regardless of when they were incurred.

233. *Id.* § 904(1).

One of the primary advantages of a continuing entity theory is that no "transfer" of the converting partnership's assets and property is required, thereby avoiding unnecessary deeds or other costly documentation of the converted entity's title to the property. Accordingly, RUPA provides simply that "all property owned by the converting partnership or limited partnership remains vested in the converted entity."²³⁴ Personal property of a converting partnership is so treated under FRUPA,²³⁵ but the rule with respect to real property is different. Defying the logic of the entity theory and eschewing RUPA's simplicity, the Revised Florida Act provides: "Title to all real property owned by the converting partnership or limited partnership shall be *transferred by deed* to the converted entity."²³⁶

Revenue was the reason for that anomalous rule. The Florida Revenue Estimating Conference reasoned that allowing title to a converting partnership's real property to pass by operation of law would cost the state money.²³⁷ That is because, under present law based on the aggregate theory, a converting partnership must transfer title to its real property by deed to the converted entity, which is a new entity. Under general law, that requires the converted entity to pay a documentary stamp tax in order to record the deed.²³⁸ To assure that FRUPA was at least "revenue neutral," the House Committee on Finance and Taxation amended the bill to continue the requirement of a deed to transfer a converting partnership's real property *to itself*.²³⁹ And thus is sausage made.

Such perverse treatment did not befall the rights of existing creditors of the converting partnership. Respecting the logic that the converted partnership is the same entity, the rights of existing creditors are not affected by the conversion. Specifically, FRUPA provides that, after the conversion, all obligations of the converting partnership continue as obligations of the converted entity and an action or proceeding pending against it may be continued as if the conversion

234. RUPA § 904(b)(1).

235. FRUPA § 904(2)(a) ("Title to all *personal* property owned by the converting partnership or limited partnership remains vested in the converted entity.") (emphasis added).

236. *Id.* § 904(2)(a) (emphasis added). The amendment was proposed by Senator Harris and adopted by the Senate on May 2, 1995. FLA. S. JOUR. 669 (Reg. Sess. 1995).

237. Memorandum from Pam Johnson, Division of Economic and Demographic Research to Consensus Estimating Conference Principals and Participants (Apr. 7, 1995) (on file with author).

238. See FLA. STAT. § 201.02, .022 (1995).

239. Fla. H.R. Comm. on Fin. & Tax'n, CS for HB 2187 (1995) Staff Analysis 2 (Apr. 30, 1995) (on file with committee).

had not occurred.²⁴⁰ Florida adds, by way of emphasis: "Neither the rights of creditors of a converting partnership or limited partnership nor any liens upon the property of a converting partnership or limited partnership are impaired by a conversion."²⁴¹

3. Mergers

The Revised Florida Act expressly authorizes the merger of a general partnership with one or more general or limited partnerships.²⁴² The FRUPA "safe harbor" procedures are similar to those governing corporate mergers. The terms of the merger, and the manner and basis of converting the interests of the partners of each party to the merger into interests or obligations of the surviving entity, must be set forth in a plan of merger.²⁴³ The plan must be approved by all the partners, unless the partnership agreement specifically provides otherwise *for mergers*.²⁴⁴ The surviving entity may be either a general partnership or a limited partnership.²⁴⁵

240. FRUPA § 904(2)(b), (3). Florida has modified the text of FRUPA to parallel the corporate merger provisions of § 607.1106, *Florida Statutes*, so that FRUPA § 904(2)(b) reads "All liabilities and obligations . . ." and FRUPA § 904(3) reads "A claim existing or action or proceeding pending by or against a converting partnership . . ." (additions to text underlined). No substantive change is intended. See FRUPA § 904, Fla. cmt. FLORIDA BAR CLE ON PARTNERSHIP LAW, *supra* note 65, at 144.

241. *Id.* § 904(4). That admonition would not appear to add anything substantive to the rights of creditors or lienors.

242. *Id.* § 905(1).

243. *Id.* § 905(2). A partner may also be "cashed out" under the terms of the plan of merger. *Id.* § 905(2)(e). The Florida Revised Act then adds specifically: "Each partner of a party to the merger is entitled only to the rights provided in the plan of merger." *Id.* § 906(1)(f). Presumably, "rights" means "economic rights."

That nonuniform amendment is troubling, however. The Revised Florida Act § 906(5) provides, as does RUPA, that a partner of a party to a merger who does not become a partner of the surviving entity is dissociated from the entity of which she was a partner, and "the surviving entity shall cause such partner's interest in the entity to be purchased" under § 701. Unless otherwise provided in the partnership agreement, that entitles a dissociating partner to the buyout value of her partnership interest, which may be more than provided in the plan of merger. In effect, a dissociating partner's FRUPA § 701 right to a buyout is similar to a dissenting shareholder's appraisal right in a corporate merger. See FLA. STAT. § 607.1302 (1995). The issue is unlikely to arise in the partnership merger context, however, because under FRUPA § 905(3), with limited exceptions, every partner must consent to the plan of merger. In any event, a partner of the surviving entity may always dissociate *after* the merger, thereby triggering a buyout of her interest in the surviving entity under FRUPA § 701, unless the partnership agreement provides otherwise. See FRUPA §§ 103(a), 601, 602(1), 603(1), and 701, discussed *supra* notes 26-32, 147-54, 179-81 and accompanying text.

A partner who is dissociated in a merger has apparent authority to bind the partnership under FRUPA § 702 and is personally liable for post-merger obligations under FRUPA § 703 to the same extent as any other dissociated partner. See FRUPA § 906(5).

244. *Id.* § 905(3)(a). Notwithstanding a provision to the contrary in the partnership agreement, a merger must be approved by all of the partners of a limited partnership, including

If the "safe harbor" provisions of FRUPA are followed, the partners' post-merger personal liability is carefully spelled out in the Act. A general partner of the surviving entity is personally liable for all pre-merger obligations for which the partner was personally liable before the merger and all post-merger obligations incurred by the surviving entity after the merger; such a general partner is not personally liable for any pre-merger obligations of a party to the merger for which the partner was not personally liable before the merger.²⁴⁶ A limited partner of the surviving entity is personally liable only for a pre-merger obligation for which he was personally liable as a general partner of a party to the merger.²⁴⁷ The surviving entity is liable for all pre-merger obligations of every party to the merger, obligations which may be satisfied out of any of the surviving entity's property.²⁴⁸

4. *Effect of Merger*

The legal effects of a partnership merger under the Revised Florida Act mirror the effects of a corporate merger. On the effective date of the merger,²⁴⁹ the separate existence of every party to the merger, other than the surviving entity, ceases,²⁵⁰ and all obligations of every party to the merger become the obligations of the surviving entity.²⁵¹ Any action pending against a party to the merger may be continued as if the merger had not occurred, or the surviving entity may be substituted as a party to the action.²⁵²

FRUPA's provisions regarding title to property owned by the parties to the merger are like those applicable to a partnership conversion. All personal property owned by each of the merged partnerships

limited partners, except as otherwise specifically provided by the law of the jurisdiction in which the limited partnership is organized. *Id.* § 905(3)(b). That is to protect limited partners from exposure to liability as general partners without their clear and knowing consent.

Florida requires that each partner be given prompt notice of the merger, together with a copy of the FRUPA merger provisions. FRUPA § 905(6); *cf. id.* § 902(6) (notice of conversion). The notice requirement may not be changed in the partnership agreement. *Id.* § 103(2)(g). The notice requirement is redundant, and its obligatory character is misguided. *See supra* note 227.

245. FRUPA § 905(2)(c).

246. *Id.* § 906(3).

247. *Id.* § 906(3)(a).

248. *See id.* § 906(1)(c). If the surviving entity becomes insolvent before satisfying a pre-merger obligation of a party to the merger, the general partners of that party must contribute the amount necessary to satisfy that party's obligations. *Id.* § 906(4).

249. *See id.* § 905(5).

250. *Id.* § 906(1)(a).

251. *Id.* § 906(1)(c). The Revised Florida Act § 906(1)(b)-(e) contain nonuniform changes similar to those in FRUPA § 904(2)-(4), § 906(1)(b)-(e) is discussed *supra* notes 235-41 and accompanying text.

252. FRUPA § 906(1)(d).

vests in the surviving entity by operation of law.²⁵³ But, as in the case of a conversion, and for the same reason, Florida does not follow the uniform rule with respect to real property owned by the merged partnerships.²⁵⁴ Instead, FRUPA requires that title to such real property be transferred by deed to the surviving entity,²⁵⁵ notwithstanding a contrary Florida rule governing the transfer of title to real property in a corporate merger.²⁵⁶

After a merger, the surviving partnership may file a statement of merger,²⁵⁷ which must contain the name of each party to the merger and the name of the surviving entity.²⁵⁸ Under RUPA, after a statement of merger is filed and, for real property, properly recorded, all property which before the merger was held in the name of another party to the merger becomes property held in the name of the surviving entity for the purposes of the partnership transfer rules.²⁵⁹ Thus, after filing and recording a statement of merger, every general partner of the surviving entity has authority to transfer property, real or personal, held in the surviving entity's name, subject to the effect of a statement of partnership authority thereafter filed by the surviving entity.²⁶⁰ Florida modifies the uniform rule by deleting any reference to *real property* of the surviving entity previously held in the name of another party to the merger.²⁶¹ The change presumably reflects the

253. *Id.* § 906(1)(b); *cf. id.* § 904(2)(a) (effect of conversion).

254. Compare RUPA § 906(a)(2); *see supra* notes 237-39 and accompanying text (discussing the reason for the Florida alteration).

255. *See* FRUPA § 906(1)(b). With respect to personal property, however, FRUPA follows the uniform rule that title to personal property owned by each of the merged partnerships vests in the surviving entity, adding "without reversion or impairment." *Id.* That qualification is taken from the Florida corporate merger provision. FLA. STAT. § 607.1106(1)(b) (1995). Since, under general law, property conveyed to a corporation no longer reverts to the grantor upon the corporation's dissolution, this qualification has no operative effect and thus is unnecessary. *See* THOMPSON ON REAL PROPERTY § 22.02, at 263 (Thomas ed. 1994).

256. *See* FLA. STAT. § 607.1106(1)(b) (1995) (title to real property owned by each party to merger vests in surviving entity by operation of law).

257. FRUPA § 907. Florida adds, as a condition of filing a statement of merger, that any limited partnership that is a party to the merger must be registered with the Department of State. *Id.* § 907(3).

258. *Id.* § 907(2).

259. *See* RUPA § 907(c) (all property except real property), (d) (real property). The Revised Florida Act § 907(4), the Florida counterpart to RUPA § 907(c), applies only to "personal property." To the extent that "personal property" includes intangible property, there is no substantive difference.

260. *See* FRUPA § 302(1)(a).

261. That is, FRUPA has no counterpart to RUPA § 907(d). Thus, the FRUPA § 302 rules for the transfer of property held in the name of the partnership do not apply to real property of the surviving entity which before the merger was held in the name of another party to the merger unless the chain of title to the property is evidenced by a deed to the surviving entity.

Therefore, the cross reference to subsection (4) in the last line of FRUPA § 907(5), the

Florida requirement that title to real property owned by the parties to the merger must be transferred to the surviving entity by deed, rather than by operation of law.²⁶²

I. *Effective Date of FRUPA and Transition Rules*

The Revised Florida Act has an effective date of January 1, 1996.²⁶³ It is not, however, applicable to all partnerships as of that date. Because of the extensive changes to existing law, especially the rules governing the relations of the partners *inter se*, FRUPA provides for a delayed date with respect to its mandatory applicability to existing partnerships.²⁶⁴

Until January 1, 1998, FRUPA will govern only those partnerships formed after January 1, 1996, the Act's effective date,²⁶⁵ unless the partnership elects to be governed by the Revised Act.²⁶⁶ Partnerships formed under present law before January 1, 1996, will continue to be governed by the Florida UPA until January 1, 1998. At any time after January 1, 1996, an existing partnership may, in the manner provided in its partnership agreement or under the UPA procedure for amending the partnership agreement,²⁶⁷ voluntarily elect to be governed by FRUPA.²⁶⁸ After January 1, 1998, FRUPA governs all Florida partnerships.²⁶⁹

counterpart to RUPA § 907(e), is correct in limiting the operation of that subsection to personal property. The reference to FRUPA § 105(3) is erroneous, however. The correct reference will be to FRUPA § 105(6). Compare RUPA §§ 105(c), 907(e). It will be corrected in the "glitch bill."

The Revised Florida Act § 907(6) is both redundant and incorrect, being identical to FRUPA § 907(5), except for the additional and inappropriate cross reference to subsection (5) in the last line. The Revised Uniform Act § 907(e), from which FRUPA § 907(6) is derived, refers to subsections (d) and (e), but FRUPA has no counterpart to RUPA § 907(d), since Florida requires a deed to transfer real property to the surviving entity in a merger. The Revised Florida Act § 907(6) will be repealed in the "glitch bill."

262. See FRUPA § 906(1)(b), discussed *supra* notes 253-55 and accompanying text.

263. 1995, Fla. Laws ch. 95-242, § 13, 2150, 2160. The Act does not affect any action or proceeding commenced or any right accrued before January 1, 1996. *Id.* § 15 (codified at FLA. STAT. § 620.91 (1995)). For an explanation of the meaning of that provision, see RUPA § 1007, cmt.

264. Accord RUPA § 1006.

265. FLA. STAT. § 620.90(1)(a) (1995). There is an exception for partnerships that are formed after January 1, 1996, to continue the business of a dissolved partnership under FLA. STAT. § 620.76 (1995) (UPA § 41).

266. FLA. STAT. § 620.90(1)(b) (1995).

267. *Id.* § 620.645(8) (UPA § 18(h)). That section requires the unanimous consent of all the partners to amend the partnership agreement, unless otherwise agreed.

268. *Id.* § 620.90(3). If before January 1, 1998, an existing partnership elects to be governed by FRUPA, the provisions of the new Act that limit a partner's liability (such as FRUPA § 704(4), which cuts off a dissociated partner's lingering liability 90 days after the filing of a statement of dissociation) are inapplicable to a third party who had done business with the partnership within the preceding year unless that party knows (or has received a notification) of the partnership's election. *Id.*

269. *Id.* § 620.90(2). The provisions of the Florida UPA, FLA. STAT. §§ 620.56-.77 (1995), are repealed effective January 1, 1998. 1995, Fla. Laws ch. 95-242, § 25.

III. FLORIDA REGISTERED LIMITED LIABILITY PARTNERSHIPS

The rush to authorize so-called registered limited liability partnerships (LLPs) began with Texas in 1991.²⁷⁰ Over thirty-five states have now adopted some form of LLP statute.²⁷¹ The impetus for protection from vicarious liability for torts committed by another partner grew out of the many lawsuits against national accounting firms and major law firms as a result of the savings and loan debacle of the late 1980s.²⁷² Lobbied for heavily on behalf of such professional partnerships, LLP laws seek primarily to limit the personal liability of a partner for malpractice committed by another partner.²⁷³ The NCCUSL drafting committee considered proposing such legislation as a part of the Revised Uniform Act, but rejected the idea because, at the time, LLPs were still novel and there was not a national consensus as to their legitimacy.²⁷⁴ In August, 1995, the Partnership Committee of the ABA Business Law Section approved a "Prototype" Registered Limited Liability Partnership Act (ABA Prototype Act) which integrates limited liability provisions directly into the Revised Uniform Act.²⁷⁵ In response to the overwhelming embrace of LLP legislation by the

270. See 1991 Tex. Gen. Laws, ch. 901, §§ 83-85 (codified at TEX. REV. CIV. STAT. ANN. art. 6132b, § 15, 45-A to -C (West 1995)); Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065 (1995). For further background and an analysis of the Texas Act, see R. Dennis Anderson et al., *Registered LLPs*, 55 TEXAS B.J. 728 (1992). The American Institute of Certified Public Accountants has lobbied extensively for the adoption of LLPs. It is no surprise that all of the so-called "Big Six" accounting firms are now Delaware-registered LLPs. See Hamilton, *supra*, at 1066.

271. See Kendall L. Houghton, *Limited Liability Companies and Partnerships: Multistate Issues Case Study*, LLC ADVISOR (CCH), Oct. 1995, at 2, 4.

272. See, e.g., Lee Berton & Joann S. Lublin, *Seeking Shelter: Partnership Structure Is Called in Question as Liability Risk Rises*, WALL ST. J., June 10, 1992, at A1; Hamilton, *supra* note 270, at 1065; BROMBERG & RIBSTEIN ON LLPs, *supra* note 6, § 1.01(a), at 2.

273. See 6 DEL. CODE § 1515(b) (1995); IOWA CODE § 486.15(2) (1995); N.C. GEN. STAT. § 59-45 (1995). See generally ABA GUIDE TO LLPs, *supra* note 6, § 2; BROMBERG & RIBSTEIN ON LLPs, *supra* note 6, § 1.02(b), at 15.

A growing number of states, however, shield partners of LLPs from personal liability for all partnership debts and obligations, not just vicarious tort liability. See *infra* note 289 and accompanying text.

274. See NCCUSL POLICY CHOICES 8 (1994).

275. The ABA Prototype Act was approved by the Partnership Committee at its meeting on August 8, 1995, and has been recommended to the ABA Business Law Section and to NCCUSL. Elizabeth (Bitsy) Hester, of Richmond, Virginia, and Edward (Doc) Merrill, of Walnut Creek, California, co-chaired the working group that authored the ABA Prototype Act. Doc Merrill was also one of the ABA advisors to the RUPA drafting committee. Louis T.M. Conti, of Orlando, was a member of the ABA Prototype Act working group and is an ABA advisor to the NCCUSL drafting committee. Betsy Hester, *Working Group RLLPs Completes Prototype Registered Limited Liability Partnership Statutes*, PUBOGRAM 3 (ABA Section of Business Law, Chicago, Ill., July 1995).

various states in late 1995, NCCUSL appointed a new committee to draft optional limited liability provisions for adoption with RUPA.²⁷⁶

Although finally enacted as a part of the same bill as the Florida Revised Uniform Partnership Act,²⁷⁷ the Florida LLP provisions are separate and independent of FRUPA.²⁷⁸ Indicative of the haste with which the states have embraced LLP legislation, the Florida LLP provisions went into effect on July 1, 1995,²⁷⁹ without any waiting period. Moreover, an existing Florida partnership may become an LLP without any notification to its present creditors or clients or other affected parties.²⁸⁰

A. Registration

To become a registered LLP in Florida, a partnership must file a registration statement with the Department of State.²⁸¹ The partnership must pay an annual registration fee of \$100 for each partner whose principal residence is in Florida, with the total not to exceed \$10,000.²⁸² The partnership's name must contain the words "Registered Limited Liability Partnership" or the designation "LLP" at the end.²⁸³ A limited partnership may also become a registered limited liability partnership, using the designation "Ltd. LLP."²⁸⁴

276. Telephone Interview with John M. McCabe, NCCUSL Legislative Director/Legal Counsel (Nov. 15, 1995). The committee is chaired by Dean Harry J. Haynsworth, IV, of William Mitchell College of Law. The reporter is Professor Carter G. Bishop of Suffolk University Law School.

277. 1995, Fla. Laws ch. 95-242, § 13, 2150, 2160.

278. *Id.* §§ 1-12, 2150, 2152. The failure to integrate the LLP provisions into FRUPA creates several ambiguities, and it has been suggested that the "glitch bill" amend FRUPA to provide a number of coordinating provisions, along the lines of the ABA Prototype Act.

279. 1995, Fla. Laws ch. 95-242, § 33, 2150, 2192. The provisions of FRUPA became effective on January 1, 1996. *Id.* § 13, 2150, 2160. Thus, an existing Florida partnership created under the UPA could have registered as an LLP, even before FRUPA became effective.

280. Section 620.786(2), *Florida Statutes*, provides that a filed statement of registration as an LLP is "notice" that the partnership is an LLP. The significance of such notice is unclear. Omission of the LLP designation (or the equivalent) in the use of the name of the partnership renders any person who participates in the omission, or knowingly acquiesces in it, liable for any indebtedness, damage, or liability "occasioned by the omission," unless the claimant had "actual notice" ("knowledge" per FRUPA), or in the exercise of reasonable diligence should have had actual notice ("notice" per FRUPA), that the partnership was an LLP. FLA. STAT. § 620.784(3) (1995). That would seem to require use of the LLP designation in the partnership's letterhead and on all billing statements, although the exact meaning is not clear.

281. FLA. STAT. § 620.78(1) (1995). The registration statement includes the usual basic information about the partnership, such as its name, principal office, registered Florida office, number of partners, and a brief statement describing its business. *Id.* There is no requirement that the partnership be formed under Florida law, and thus a foreign partnership could file as a registered LLP under the Florida statute. This may be changed in the "glitch bill."

282. *Id.* § 620.78(3), (6). Non-resident partners were exempted from the registration fee at the urging of large, national accounting and law firms with fewer than 100 Florida partners.

283. *Id.* § 620.784(1).

284. *Id.* § 620.788(1), (2)(c). Only a domestic limited partnership may become an LLP in Florida. *Id.* Limited liability limited partnerships are being referred to as LLLPs.

B. Mandatory Insurance

Under the Florida statute, an LLP must carry liability insurance covering the errors, omissions, negligence, malpractice, and wrongful acts for which a partner's liability is limited.²⁸⁵ The statutory "minimum coverage amount" of such insurance is \$100,000 multiplied by the number of partners, up to a maximum of \$3 million.²⁸⁶ Many states' LLP statutes do not have an insurance requirement.²⁸⁷

C. Limitation of Partners' Personal Liability

Most of the early LLP statutes limited a partner's individual liability only in the case of torts committed by another person, such as the malpractice of another partner.²⁸⁸ The recent trend, however, is to expand the limitation to cover other liabilities, and at least fifteen states now shield partners fully from individual liability for any and all partnership obligations, other than their own malpractice and other tortious conduct.²⁸⁹

285. *Id.* § 620.7851(1)(a). An LLP may, in lieu of such insurance, provide an irrevocable letter of credit in the minimum coverage amount, issued by an authorized bank or savings association. *Id.* § 620.7851(1)(b).

286. *Id.* § 620.7851(2).

287. *See, e.g.*, GA. CODE §§ 14-8-44 to 64 (1995); MINN. STAT. §§ 323.44-.47 (1994); N.Y. PARTNERSHIP LAW §§ 121-1500 to 1503 (McKinney 1995). The ABA Prototype Act does not have an insurance requirement.

288. *See* ABA GUIDE TO LLPs, *supra* note 6, § 2.

289. *See* BROMBERG & RIBSTEIN ON LLPs, *supra* note 6, § 1.01. New York and Minnesota were the first states to adopt so-called full-shield statutes. *See id.* § 1.01(d). Many of the "second generation" LLP acts adopted in 1995 completely eliminate partners' vicarious liability. In addition to the eleven states cited by Bromberg and Ribstein, *id.* § 1.10(e), four additional states have now adopted full-shield statutes. *See* CAL. CORP. CODE § 15015 (West 1995); 1995 MASS. LAWS ch. 281 (H.B. 4045); 1995 OR. LAWS ch. 689.; PA. CONS. STAT. ANN. §§ 8201-21 (1995).

Section 306(c) of the ABA Prototype Act provides a full corporate-type shield:

A person is not, solely by reason of being a partner, liable, directly or indirectly, including by way of indemnification, contribution, assessment or otherwise, for debts, obligations or liabilities of, or chargeable to, the partnership, whether sounding in tort, contract or otherwise, which are incurred, created or assumed by the partnership while the partnership is a registered limited liability partnership.

Unlike Section 620.782(2)(b), *Florida Statutes*, and most state LLP statutes, the ABA Prototype Act is silent with respect to a partner's liability for the partner's own malpractice and other misconduct, including the partner's failure to supervise others. Those matters are thus left to general law, in the same manner as the personal liability of an active corporate shareholder.

The uniform LLP amendments to RUPA, soon to be considered by the NCCUSL drafting committee, include full-shield protection. Section 306(c) of the initial proposed draft provides:

Notwithstanding contrary provisions in a partnership agreement existing on the effective date of a registration statement, obligations incurred while a partnership is a registered limited liability partnership, whether arising in contract, tort, or otherwise, are solely the obligations of the registered limited liability partnership. A partner is not

The Florida statute²⁹⁰ is of the more benign type. It provides:

- (1) A partner in a registered limited liability partnership is not individually liable for obligations, or liabilities of the partnership, whether in tort, contract, or otherwise, arising from errors, omissions, negligence, malpractice, or wrongful acts²⁹¹ committed by another partner or by an employee, agent, or representative of the partnership while the partnership is a registered limited liability partnership.
- (2) Notwithstanding any other provision of this act, a partner in a registered limited liability partnership is individually liable for:

personally liable for such an obligation of the registered limited liability partnership solely by reason of being or acting as a partner.

UNIFORM PARTNERSHIP ACT (Discussion Draft Dec. 6, 1995). New Article 11 provides for the registration of a domestic partnership (or limited partnership) as an LLP (or LLLP), and Article 12 provides for the registration of a foreign LLP. The proposed uniform amendments do not contain any insurance requirement.

Limiting the vicarious personal liability of partners runs counter to the economic analysis of some commentators. These commentators suggest that limited liability is not efficient in the context of a closely held enterprise and therefore the shareholders of a close corporation *should* be held personally liable. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 55-56 (1991). This argument is strongest in the case of tort liability. See Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991). Others argue that limited liability is efficient and should be extended to any form of closely held enterprise. See, e.g., Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 171-72 (1992); Larry E. Ribstein, *The Deregulation of Limited Liability and the Death of Partnership*, 70 WASH. U. L.Q. 417, 438-50 (1992). One commentator has taken a middle ground. See David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1636 (1991) (limited liability conditioned on adequate liability insurance). Whether or not limited liability for closely held business enterprises is economically efficient, the political judgment would seem to have been resolved by the approval of full-shield Limited Liability Companies (LLCs) in nearly every state. See William J. Carney, *Limited Liability Companies: Origins and Antecedents*, 66 U. COLO. L. REV. 855, 857-59 (1995); Robert B. Thompson, *The Taming of Limited Liability Companies*, 66 U. COLO. L. REV. 921, 939-43 (1995). The adoption of the Massachusetts LLC Act, H.B. 4045, 1995 Law ch. 281, leaves only Hawaii and Vermont without LLC legislation. See *Massachusetts Passes LLC Legislation*, LLC ADVISOR 4, 3 (CCH Dec. 1995). There is little to distinguish LLPs from LLCs with respect to the risk of harm to creditors from full-shield protection against personal liability. For a comparison of members' personal liability in LLCs and LLPs, see BROMBERG & RIBSTEIN ON LLPs, *supra* note 6, § 3.01.

290. FLA. STAT. § 620.782(1) (1995).

291. The term "wrongful acts" is ambiguous. It is not altogether clear, for example, whether "wrongful acts" would include a partner's intentional torts or civil liability under various statutory regimes, such as employment discrimination or sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-3 (1994). See BROMBERG & RIBSTEIN ON LLPs, *supra* note 6, § 3.04(b), ex. 4, at 87-88. If so, the partnership must have liability insurance or a letter of credit covering such liability. See FLA. STAT. § 620.7851 (1995). Insurance coverage for such misconduct is not available, however.

- (a) Any debts or obligations of the partnership arising from any cause other than those specified in subsection (1);
- (b) Any errors, omissions, negligence, malpractice, or wrongful acts committed by the partner or any person under the partner's direct supervision and control in the specific activity in which the error, omission, negligence, malpractice, or wrongful act occurred; or
- (c) Any debts for which the partner has agreed in writing to be liable.

The liability of the partnership entity is not affected by those limitations on the partners' individual liability.²⁹²

The Florida statute also provides that the liability of partners in an LLP "formed and registered" under the Florida LLP provisions must be determined solely by these Florida LLP provisions.²⁹³ If a conflict arises between the laws of Florida and any other jurisdiction with regard to the individual liability of a partner in an LLP "formed and registered" in Florida, the statute provides that the laws of Florida shall govern.²⁹⁴ That rule is binding on Florida courts,²⁹⁵ but it may not be followed by courts in other states.²⁹⁶

D. Regulation of LLP Rendering Professional Services

An LLP that provides professional services regulated by a state regulatory agency remains subject to the agency's supervision, including disciplinary proceedings, in the same manner and to the same extent as an individual who is licensed to practice such a profession.²⁹⁷ It is uncertain whether a Florida law firm may become an LLP. To remove any doubt, the Florida Supreme Court may be requested to approve

292. FLA. STAT. § 620.782(5) (1995).

293. *Id.* § 620.783(1).

294. *Id.* § 620.783(2); see also *id.* § 620.7885(4) (liability of partners of registered foreign LLP governed by law of state of organization).

295. See RESTATEMENT (SECOND) OF CONFLICTS § 6(1) (1969) (court will follow a statutory directive of its own state).

296. The RESTATEMENT (SECOND) OF CONFLICTS § 174 (1969) provides that a partner's vicarious liability for the torts of another partner is determined by the law selected under § 145 principles. Section 145, in turn, provides that tort liability is determined by the local law of the state with the "most significant relationship to the occurrence and the parties," including the place of the injury, the residence of the parties, and the place where the relationship between the parties is centered. See Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: The Restatement's View of LLCs and LLPs in Interstate Transactions*, LLC ADVISOR 4, 5 (CCH Apr. 1995); Louis F. Lobenhofer, *Limited Liability Entities in Ohio: A Primer on the Limited Liability Company and Partnership with Limited Liability, Their Substantive and Tax Aspects*, 21 OHIO N.U. L. REV. 39, 94-95 (1994).

297. FLA. STAT. § 620.787(1) (1995). The LLP must provide the agency with a certified copy of its registration statement. *Id.* § 620.787(2).

the practice of law as an LLP and to modify The Florida Bar Rules accordingly.²⁹⁸

E. Foreign Registered Limited Liability Partnerships

Before transacting business in Florida "as such," a foreign registered limited liability partnership must register with the Department of State as a foreign LLP.²⁹⁹ The registration fee is the same as for a domestic LLP.³⁰⁰ As a condition of registering in Florida, a foreign LLP must have liability insurance with the same minimum coverage amount as a registered Florida LLP,³⁰¹ even if no insurance is required under the law of the jurisdiction in which it was formed.³⁰²

Somewhat surprisingly, the Florida statute expressly provides that a foreign LLP's "organizational and internal affairs, *including the liability of partners*," is governed by the laws of the jurisdiction under which the foreign LLP is organized.³⁰³ That means the partners in a New York LLP, registered and doing business in Florida, have no personal liability to Florida contract creditors, without regard to the parties' other contacts with Florida. In light of the much broader liability shield now available to LLPs in several other states, that choice of law provision is likely to foster a market in foreign LLPs, much to the detriment of Florida creditors.³⁰⁴

298. Presently, The Florida Bar Rules neither authorize nor prohibit the practice of law as an LLC or an LLP. By analogy to the practice of law by a professional corporation (P.C. or P.A.), which is permitted in Florida, there should be no objection to the practice of law without vicarious malpractice liability by all members of the firm. See FLA. R. PROF. CONDUCT 4-8.6.

That rule was originally adopted by the Florida Supreme Court in 1961. See *In re The Florida Bar*, 133 So. 2d 554 (Fla. 1961). The court stated: "In addition to the individual liability and responsibility of the stockholder, the corporate entity will be liable for the misprisions of its members to the extent of the corporate assets." *Id.* at 555. But see *First Bank & Trust Co. v. Zagoria*, 302 S.E.2d 674 (Ga. 1983), where the Georgia Supreme Court held, pursuant to its authority to regulate the practice of law, that every member of a Georgia law firm is personally liable for the malpractice of the other members, even if the firm is organized as a professional corporation under a state statute purporting to grant limited liability.

299. FLA. STAT. § 620.7885(1) (1995).

300. *Id.* § 620.7885(3). The fee is \$100 per partner whose principal residence is in Florida, not to exceed \$10,000. *Id.*

301. *Id.* The minimum coverage amount is \$100,000 per partner, up to \$3 million. *Id.* § 620.7851(2).

302. A foreign LLP that was required to obtain liability insurance under its domestic law may use that insurance to satisfy the Florida insurance requirement. See *id.* § 620.7885(2).

303. *Id.* § 620.7885(4). As originally filed, the bill provided that a partner's liability in an LLP registered in Florida would be governed by the law of Florida. See CS for HB 717, § 10 (1995) (proposed FLA. STAT. § 620.84(4)).

304. It is not surprising that, according to the records of the Department of State, four of the first six LLPs to register under the new Florida law were foreign. For an interesting discussion of the potential market for foreign partnership charters, see Allan W. Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219, 247-50 (1994).

IV. CONCLUSION

The Revised Uniform Partnership Act is a much needed updating of the law of partnership. It clarifies many of the old rules, enhancing certainty and predictability. Adoption of the entity theory simplifies the statutory implementation of many rules, including some that have not been substantively changed. The most significant substantive change, perhaps, is the complete restructuring of the partnership breakup rules, which, under the UPA, had long been a source of irritation and confusion. The revised rules governing the transfer of partnership property should lower transaction costs and enhance the certainty of title, especially with respect to real property held in the name of the partnership. The new conversion and merger rules will be greatly appreciated by those involved in such transactions. The new fiduciary duty rules, although criticized by some, are firmly rooted in traditional principles, while permitting a reasonable degree of private ordering. The recognition of limited liability partnerships is in keeping with the contemporary national trend.

Florida should benefit from its vanguard adoption of the Revised Uniform Act. It will be applauded by the state's business community and the commercial law bar. By improving efficiency in the formation and operation of partnerships, it will benefit the Florida economy. Being a uniform law, it will facilitate interstate activity by enhancing the familiarity and confidence of those dealing with Florida partnerships. Extensive nonuniform changes have been avoided, thereby optimizing those benefits. Its early adoption will also contribute to Florida's growing reputation for leadership in providing a hospitable legal environment for business. In sum, Florida will enter the twenty-first century with a thoroughly contemporary partnership law.